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In The

Supreme Court of the United States

October Term, 1995

BRIAN K. COPELAND,

Petitioner,

v.

MBNA AMERICA, N.A.,

Respondent.

Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress intend for Delaware's legislative definition of "interest" to define the federal term "interest" in Section 30 of the National Bank Act, 12 U.S.C. § 85 ("§ 85"), and thereby displace other states' laws limiting the form or the amount of liquidated damages for late payments on revolving credit accounts?

2. May Congress constitutionally delegate to Delaware the power to define the federal lending term "interest" for all fifty states so as to preempt other states' consumer protection and contract laws?

3. As a matter of federal law, does the term "interest at the rate" in § 85 include contingent, sum-certain penalty charges (late fees), so as to preempt state limitations on the form or the amount of contractual liquidated damages on revolving credit accounts?

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Brian K. Copeland ("petitioner" or "cardholder") respectfully petitions for a writ of certiorari to review the judgment entered below by the Colorado Supreme Court. The judgment is one of three decisions rendered by state supreme courts on the very same federal issues within the last three months. The other decisions are *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal Rptr. 2d 441, 900 P.2d 690 (1995), *petition for cert. pending*, No. 95-860 (U.S. filed Nov. 30, 1995), and *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, slip op. (N.J. Nov. 28, 1995) (App. 51-124), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995).[1] Both the decision below and the opinion in *Smiley* directly conflict with the New Jersey Supreme Court's holding in *Sherman*. Given the conflicts and the number of petitions pending, the need for review by the Court is urgent.

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[1] There are two additional petitions pending in this Court raising nearly identical questions. In *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733, *review granted*, 38 Cal. Rptr. 2d 346, 889 P.2d 1540 (Cal. 1995), *appeal dismissed*, 46 Cal. Rptr. 2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (U.S. filed Dec. 18, 1995), the California Court of Appeal held that California contract provisions limiting liquidated damages are preempted by the word "interest" in § 85. The California Supreme Court dismissed the appeal in *Harris* after issuing its decision in *Smiley*. A petition for certiorari was filed in this Court on December 18, 1995. In *Hunter v. Greenwood Trust Co.*, No. A-103-94, slip op. (N.J. Nov. 28, 1995) (App. 125-26), *petition for cert. pending*, No. 95-963 (U.S. filed Dec. 18, 1995), a companion case to *Sherman*, the New Jersey Supreme Court followed its holding in *Sherman*. *Hunter* raises the same issues except that it concerns credit card late fees charged by federally insured state banks pursuant to section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d ("§ 521"), modeled after § 85.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. 1-17) is not yet published but is reprinted at 1995 Colo. LEXIS 743 (Nov. 20, 1995). The opinion of the Colorado Court of Appeals (App. 21-26) is published at 883 P.2d 564 (1994). The Order of the District Court, City and County of Denver, Colorado (App. 27) is unreported.

JURISDICTION

The Colorado Supreme Court entered its judgment (App. 1-17) on November 20, 1995. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1 of the United States Constitution directs, in pertinent part, that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

The Supremacy Clause provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Full Faith and Credit Clause requires, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

Section 30 of the National Bank Act, as codified at 12 U.S.C. § 85, provides, in pertinent part:

> Any [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. . . .

12 U.S.C. § 85 (1982).

Prior to codification, Section 30 of the National Bank Act also provided what is now codified, in relevant part, in 12 U.S.C. § 86:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of the title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action on debt, twice the amount of the interest thus paid. . . .

When this litigation began, the Colorado Uniform Consumer Credit Code ("UCCC"), Colo. Rev. Stat. § 5-3-203 (1992) stated, in pertinent part:

> (5)(a) Except as provided in paragraph (b) of this section (5), with respect to a consumer loan, refinancing, or consolidation which is not precomputed, including a revolving loan account, the parties may contract for a delinquency

> charge on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the installment or ten dollars; except that the provisions of this paragraph (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.[2]

Section 945 of Title 5 of the Delaware Code, entitled "Interest charges," provides in pertinent part:

> In addition to or in lieu of interest at a periodic percentage rate or rates . . . , a bank may, if the agreement governing the revolving credit plan so provides, charge and collect, as interest, in such manner or form as the plan may provide, 1 or more of the following:
>
> (1) A daily, weekly, monthly, annual or other periodic charge in such amount or amounts as the agreement may provide for the privileges made available to the borrower under the plan;
>
> (2) A transaction charge or charges in such amount or amounts as the agreement may provide for each separate purchase or loan under the plan
>
> (3) A minimum charge for each daily, weekly, monthly, annual or other schedule billing period under the plan during any portion of which there is an outstanding unpaid indebtedness under the plan. . . .

Del. Code Ann. tit. 5, § 945. Section 950 of Title 5 of the Delaware Code, which is entitled "Delinquent installments," provides in pertinent part:

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[2] The section was amended during the pendency of this litigation.

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default; provided, however, that no more than 1 such late or delinquency charge may be imposed in respect of any single such installment payment or portion thereof regardless of the period during which it remains in default. . . .

Del Code Ann. tit. 5, § 950.

STATEMENT

The Colorado Supreme Court held below that the law of a bank's home state, in this case Delaware, provides the definition of "interest" in § 85. Delaware's definition of "interest" includes late fees. *See* Del. Code Ann. tit. 5, §§ 945 & 950. Incorporating that definition into § 85 results in Delaware law preempting Colorado's prohibition of late charges on revolving credit accounts held by Colorado consumers. Can Delaware enlarge the definition of a federal term in a federal statute and thereby determine and expand the scope of federal preemption? Can one state preempt without limitation the consumer protection and contract laws of all the other states? These are fundamental constitutional questions that are at issue here and in the certiorari petitions filed in *Smiley* and *Sherman*.

A. Background and Facts

Congress passed the National Bank Act in 1864 against the backdrop of the Civil War. The Act had two purposes – to establish a national banking system with a uniform national currency and to prevent states from discriminating against national banks. To prevent discrimination, Congress crafted into the Act a number of

protective provisions, including, most notably, § 30,[3] now codified as § 85 and 12 U.S.C. § 86 ("§ 86"). Section 85 embodies the "most favored lender" doctrine enunciated by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874). That doctrine allows a national bank to charge the highest "rate" of "interest" allowed by its home state. Section 85 also provides an alternative federal interest rate not measured by state law and permits a national bank to charge whichever of the two interest rates is higher. Section 86 then provides the penalty (twice the amount of interest charged) applicable in the event the bank charges more than the allowed rate.

Congress enacted these provisions intending the term "interest" to have a firm federal definition that would not depend on unique state definitions. *See Tiffany*, 85 U.S. at 410 (holding that "interest" must "receive a strict, that is literal construction" to avoid subjecting banks to the penalty of double the interest collected). Although the numerical rate of interest under the statute could vary from state to state, the meaning and substantive components of "interest" for national banks would be uniform throughout the country. In other words, § 85 incorporates only the rate ceilings of a bank's home state, not the states' varying definitions of "interest." *See National Bank v. Johnson*, 104 U.S. 271, 277 (1881) (construing *Tiffany* and holding that only the "rate" of interest is federalized by § 85, not the character of the contracts banks are authorized to make).

Years later, this Court, in *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), considered the meaning of the word "located" in § 85 and the preemptive scope of the statute. Announcing what has become known as the "exportation" doctrine, the Court held that a national bank may "export" its home state's *interest rate*

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[3] Act of June 3, 1864, Ch. 106, § 30, 13 Stat. 108 (1864), *as amended and codified in* 12 U.S.C. §§ 85 & 86 (1982).

into other states. Though the Court held that "located" has a firm, federal definition, it did not define the terms "interest" or "rate," nor did it hold that the laws of a national bank's home state govern all the contractual terms or charges (other than "interest" as defined by Congress) imposed on consumers in other states.

Since *Marquette*, several small states (the "bank friendly states") and numerous banks have attempted to expand the "exportation" doctrine beyond the parameters established by this Court and Congress. During the 1980s, some of those states, most notably Delaware, the current home of MBNA America Bank, N.A. ("MBNA" or "the bank"), and South Dakota, sought to attract large credit card operations by deregulating banking and repealing consumer protection laws. *See* Federal Reserve Bank of Chicago, "Small States Teach a Big Banking Lesson," *Chicago Fed. Letter*, No. 10 (June 1986).[4] Against the backdrop of *Marquette*, those states passed unique legislation that, contrary to the common law, defined "interest" as including late fees, attorneys fees and other contract terms and penalties. The idea was to allow national and

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[4] The bank friendly states' efforts to entice credit card issuers to relocate from other states have been wildly successful. *See Chicago Fed. Letter supra*. Today, of the top ten issuers, six are located in Delaware, while a seventh, the single largest issuer of Visa cards and Mastercards, is located in South Dakota. To keep even more card issuers from relocating to these deregulated states, other states have been forced to relent and repeal consumer protection statutes limiting penalty charges and other non-interest fees. *See id.* As this race to the bottom has unfolded, more and more consumers have lost the ability to effect legislative checks or balances on oppressive or unfair contract terms. If the federal term "interest" means "all lending terms," as MBNA has argued, and if only the laws of a bank's home state may define and regulate those lending terms, then § 85 has pitted state against state, making it politically impossible, as a practical matter, for citizens to effect legislative change on either the local or national levels.

other banks in those states to "export" the terms and penalties into other states under the guise of "interest," a prospect that goes well beyond the exportation allowed under *Marquette*.

The present case challenges the exportation of contract penalties by MBNA. From Delaware, MBNA issues credit cards to customers nationwide. (App. 30, 34). MBNA charges these customers not only a hefty annual percentage rate, but also a separate and additional $15 late charge if a specified minimum payment is not received within a certain number of days after the payment due date. (App. 34-35). MBNA charges the $15 flat fee regardless of the outstanding balance, the amount of the payment owed, or the actual number of days the payment is late. In addition, MBNA's cardholder agreement treats the late payment as a technical breach of the contract and does not waive the default even if the late fee is paid. (App. 35). Bearing no relationship to the amount owed, the passage of time or the bank's cost resulting from a delay in payment, the late fee is a classic contract penalty that exceeds any reasonable provision for liquidated damages. (*See* App. 36, 45).

MBNA charges its late fees in every state, including those that prohibit or limit such liquidated damage provisions. Colorado is one of the states that regulates late fees. Here, MBNA exported its late fees into Colorado and imposed them on petitioner and other Colorado residents in violation of Colorado law. In response, cardholder filed this consumer class action on June 5, 1992, on behalf of himself and all other Colorado residents who have been charged late charges on credit cards issued by MBNA.[5] (App. 31).

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[5] Cardholder's complaint asserts that, in charging the late fees, MBNA: (1) violated the Colorado Consumer Credit Code ("the Code"), Colo. Rev. Stat. § 5-3-203(5)(a), which prohibited delinquency charges (such as late fees) on revolving credit

B. How the Federal Question Was Presented and Resolved Below

After this case was removed to federal court and then remanded back to the state district court,[6] MBNA presented the federal question in moving for judgment on the pleadings. Relying primarily on *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *reversing* 776 F. Supp. 21 (D. Mass. 1991), *cert. denied*, 113 S. Ct. 974 (1993), MBNA contended that Colorado law regulating penalty charges is preempted by § 85. The trial court, on July 9, 1993, entered an order dismissing cardholder's complaint. (App. 27).

Cardholder filed a notice of appeal on July 19, 1993. Following briefing and oral argument, the court of appeals affirmed the trial court. The court of appeals concluded that "the term 'interest' under § 85 includes late fees." (App. 24). Reasoning that "any Colorado law prohibiting such a charge stands as an obstacle to the accomplishment and execution of the Bank Act," the court held that cardholder's claims were preempted. (App. 26). On May 24, 1994, cardholder petitioned the Colorado Supreme Court for a writ of certiorari to review

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accounts prior to 1994 (App. 41-45); (2) violated section 6-1-105 of the Colorado Consumer Protection Code, Colo. Rev. Stat. § 6-1-105, by creating confusion in charging "Late Charges" which it now contends are "Finance Charges" (App. 46-48); and (3) was unjustly enriched (App. 45-46).

[6] On or about July 19, 1992, MBNA, asserting both diversity and federal question jurisdiction, removed the action to the United States District Court for the District of Colorado. Cardholder then moved to remand the case back to state court. In granting the motion to remand, the federal court found that "the ordinary meaning of the word interest does not include late fees" and that § 85 did not completely preempt cardholder's Colorado claims. *Copeland v. MBNA America, N.A.*, 820 F. Supp. 537, 540-41 (D. Colo. 1993).

the court of appeals' ruling. The court granted the petition on October 24, 1994. (App. 18).

On November 20, 1995, the Colorado Supreme Court affirmed dismissal of the case but held that "this case does not raise a preemption issue." (App. 6, n. 4). According to the court, the fact that incorporating Delaware law has only an "incidental effect" on enforcement of Colorado law does not amount to a showing of preemptive effect. (*Id.*) Since Congress has not attempted to interfere with Colorado's regulation of state banks or to occupy the field of consumer loans, the court reasoned that the dispositive issue was whether Congress intended for Delaware's legislative definition of "interest rate" to displace Colorado's consumer protection and common laws prohibiting late fees. (*Id.*). The court then concluded that, as a matter of federal law, the late fees imposed by the bank are a form of "interest" under § 85. (App. 6). Noting that Delaware, the bank's home state, permits the imposition of late fees, the court held that MBNA could charge such fees in Colorado despite Colorado's law to the contrary.[7] (App. 6-7).

Though stating that the dispositive issue was whether Congress intended for the law of the bank's

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[7] Pursuant to the Colorado UCCC choice of law provision, Colo. Rev. Stat. § 5-1-201(9)(a), Colorado law applies to all consumer credit contracts offered to Colorado residents if the lender has solicited the consumer in Colorado and the consumer has signed the application or accepted the contract in Colorado, as cardholder has alleged here. (*See* App. 33-41); *see also Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978) (implicating Oklahoma choice-of-law doctrine); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977) (implicating Wisconsin choice-of-law doctrine); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied sub. nom., Aldens, Inc. v. Kane*, 425 U.S. 943 (1976) (implicating Pennsylvania choice-of-law doctrine).

home state to define "interest" in § 85 and thereby displace other states' laws, the court devoted most of its opinion to determining whether, apart from Delaware law, late fees are "interest." Observing that § 85 itself does not define "interest" and that the legislative history does not address the issue, the court turned to judicial interpretations it deemed expansive. (App. 8-12). Despite the absence of the phrase "related to" in § 85, and *Tiffany's* mandate of a "literal construction," the court inferred that, as banking has evolved, various other precedents have expanded the statute to include as "interest" additional banking charges "related to" loans. (*See* App. 12). Based on this evolution, the Colorado court determined that a national bank can charge a variety of banking fees as forms of "interest" to credit cardholders in other states if allowed by the bank's home state. (*See id.*). Having previously stated that the legislative history of the National Bank Act does not answer the question, however, the court then contradicted itself and held that the Act's "purpose and legislative history compel a finding that late payment fees are a form of 'interest' under § 85." (App. 17).

REASONS FOR GRANTING THE PETITION

This Court should review and reverse the decision below because (i) it conflicts with the New Jersey Supreme Court's decision in *Sherman* on the same federal issues; (ii) it conflicts with controlling decisions of this Court, including *Tiffany*; (iii) it endorses a form of state supremacy over other states; (iv) it disregards the preemption issue; (v) it gives unwarranted deference to informal and contradictory interpretations of the Office of the Comptroller of the Currency ("OCC"); and (vi) it has immediate nationwide impact on states, consumers and national banks.

A. The Colorado Supreme Court's Decision Conflicts With the New Jersey Supreme Court's Decision on the Same Federal Issues.

As noted, both the decision below and the California Supreme Court's opinion in *Smiley* conflict with the New Jersey Supreme Court's recent decision in *Sherman*. All three cases involve the same practices by national banks and identical federal preemption issues. Like the California court in *Smiley*, the court below rewrote the statute to add the phrase "related to" to § 85. In effect, the court held that the laws of a national bank's home state dictate the charges "related to" a loan and thus define the federal term "interest" and the preemptive scope of the statute. (*See* App. 12). Accordingly, where, as here, the home state defines "interest" as including late fees, the laws of that one state operate to preempt all other states' consumer protection and contract laws regulating contract penalties like late fees. The New Jersey Supreme Court, however, reached a different result in *Sherman*. Declining to rewrite the statute or to define "interest" in § 85 based on the home state's law, New Jersey's high court held that late fees are not "interest" and that § 85 does not preempt state regulation of late fees.[8] (App. 54, 67).

Because these state supreme courts have decided the same federal issues oppositely, there is a direct conflict that should be resolved by this Court. In addition, numerous other cases involving the very same issues are

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[8] In so holding, the New Jersey Supreme Court criticized or disagreed with a number of points made by the Colorado court. For example, the New Jersey court disagreed with the Colorado court's understanding of the historical usage of the term "interest" and with its reliance on the OCC's contradictory interpretations of the term. *See Sherman* (App. 69, 72).

pending nationwide and have resulted in additional conflicts.[9] These conflicts cannot be resolved by any other court and will result in different federal preemption standards for the same practice in different parts of the country. This Court should grant certiorari immediately to resolve these and the other conflicts we detail below.

B. The Colorado Supreme Court's Decision Has Wide-Ranging and Dangerous Consequences

This case and *Smiley* implicate important issues that go beyond the preemption questions typically confronted by the Court. Unlike any other preemption case decided by the Court, the petitions here and in *Smiley* challenge holdings that tie the scope of federal preemption directly to the ever-changing legislation of an individual state that

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[9] In Pennsylvania, the intermediate appellate court, like the New Jersey Supreme Court, ruled in favor of the cardholders in two cases, finding no preemption of state law. One of those decisions was decided *en banc*. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *alloc. granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *alloc. granted*, 659 A.2d 984 (Pa. May 31, 1995). The Pennsylvania Supreme Court has granted discretionary review in both cases but has not yet heard oral argument. Also, an appeal concerning many of these same issues has been briefed and argued before the United States Court of Appeals for the Third Circuit. *In re Consolidated Credit Card Appeals*, Nos. 94-3203/04, 94-3215/16/17/18 (3d Cir. appeal pending). Having argued the appeal on February 2, 1995, the parties to that litigation are waiting for the court's decision. Finally, on December 18, 1995, the Colorado Supreme Court issued two additional decisions in cases raising the same issues. *Stoorman v. Greenwood Trust Co.*, No. 94SC382, slip op. (Colo. Dec. 18, 1995) (construing § 521 of DIDA); *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, slip op. (Colo. Dec. 18, 1995) (construing § 85). The cardholders in those cases will also be filing petitions for a writ of certiorari in this Court.

is home to a national bank. If, as the Colorado Supreme Court has held, § 85 has been judicially amended to include all charges "related to" a loan so that Delaware has been entrusted to define the components of "interest" and not just the arithmetic "rate," then Delaware's legislative definition of loan-related charges has displaced the contract and consumer protection laws of all the other states. Under the ruling below, the breadth of preemption intended by Congress will be determined not by federal law but by state law so that it may vary from state to state and time to time.

The Colorado Supreme Court thus has endorsed a radical preemption doctrine unknown to any other federal statute. That doctrine establishes a form of state supremacy over other states that is unconfined by any federal standard limiting the preemptive actions of the favored states. If a bank's home state authorizes any loan-related fee or term, that authorization will preempt other state laws where the banks are soliciting business. In this way, the Colorado decision has allowed Congress to make the home states of banks supreme to all others.

This is so because the driving force behind the Colorado decision is a misconstruction of the "most favored lender" doctrine. Reading that doctrine expansively, the lower court has held in effect that all loan-related charges or terms must be "interest" if they are allowed for other lenders in a bank's home state. Under that analysis, attorneys fees, court costs, foreclosure fees and other default penalties would be federalized "interest" if allowed by a bank's home state. Thus, as Delaware has done here, the home states of banks could preempt countless laws of other states simply by connecting their loan-related authorizations to the "interest" allowed in the home state.

In this regard, the decision below conflicts in principle with this Court's preemption analysis in *New York Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995). In *Travelers Ins. Co.*, this Court

considered an express preemption clause which, unlike here, included the phrase "related to" in the express preemption of the federal statute. *See id.* at 1675. Contrary to the Colorado court's analysis below, this Court refused to read the phrase "related to" as including the entire economic package of insurance-related costs. *See id.* at 1679-80. Ignoring that decision, the court below not only judicially added the phrase "related to" to § 85 but then even interpreted that section to include the entire package of loan-related charges in the preemptive scope of the statute. As a result, the lower court judicially enlarged the federal statute in violation of this Court's preemption principles.

By linking the scope of "interest" to the laws of a bank's home state, the decision below also conflicts with this Court's decisions interpreting § 85. In *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901), the Court held that "the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state." *Id.* at 134. Similarly, in *Evans v. National Bank*, 251 U.S. 108 (1919), the Court recognized that both "interest" and "usury" are determined by reference to federal law, stating:

> The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much arises from federal law. The latter also completely defines what constitutes the taking of usury by a national bank, *referring to the state law only to determine the maximum permitted rate.*

Id. at 114 (emphasis added). The holding of the court below ignores and impliedly rejects these controlling authorities.

Furthermore, in incorporating Delaware's definition of interest into § 85, the court below utterly failed to recognize that Congress has never incorporated state law without limitation into a federal statute if the result

would be that the state's laws would preempt other states' laws. Congress has instead limited incorporation to well-defined areas in which the state standard would operate principally if not exclusively within the boundaries of the state itself, not in other states. *See, e.g., United States v. Sharpnack*, 355 U.S. 286 (1958) (addressing Assimilative Crimes Act of 1948, which adopted state law as the federal criminal law for military bases and federal enclaves located in each particular state).

This case is not one in which the incorporation of Delaware law affects only Delaware. The Colorado court's ruling that Delaware law defines "interest" or loan-related charges in § 85 leads to the absurd and unconstitutional result that Congress has authorized Delaware to legislate federal lending terms for the entire country. The Constitution does not allow MBNA to define federal law with reference to its own state's laws and thereby elevate Delaware law over the laws of Colorado and other states. Nor can the states constitutionally enlarge or diminish the scope of federal preemption by redefining the federal term "interest." "To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

Moreover, the lower court's decision conflicts with this Court's anti-delegation precedents. Article I, section 1 of the Constitution provides that "[a]ll legislative powers . . . *shall be vested in a Congress* of the United States." U.S. Const. art. I, § 1 (emphasis added). If, as held below, the scope of "interest" in § 85 is determined by the law of a bank's home state, then Congress's delegation of such legislative authority to Delaware violates Article I.

This Court's decision in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), demonstrates the point. In that case, the Court described the standards for delegating congressional power and struck down a statute that delegated interstate policy-making authority to the President, who then adopted state laws as the operative restrictions. In rejecting the open-ended delegation, the Court focused on the absence of any guidelines limiting the scope or nature of the delegated authority:

> [The statute] does not seek to lay down rules for the guidance of state Legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority. . . . It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action.

Id. at 415. The Court also found that the context of the statute failed to provide any "standard or rule" against which the delegated authority could be measured. *Id.* at 418.

Here, delegation to Delaware of the legislative power to define the federal term "interest" or charges "related to" interest likewise fails. Neither the word "interest" nor the legislative history of the National Bank Act, as interpreted by the lower court, provides any guidance to the states or to a reviewing court as to the scope of the term or the limits of the delegated discretion. As interpreted by the lower court, Congress has provided no definition, established no standard, laid down no rule and declared no policy separate from that of the individual states and, therefore, the delegation is unconstitutional.[10] *See Panama*

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[10] To be sure, *Marquette*, in effect, permits a bank's home state to establish "interest rates" that are controlling in other states. But that result does not amount to a limitless delegation of Congress's lawmaking authority. The federalization of a

Refining, 293 U.S. at 430 ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested").[11]

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time-based "*rate*" or required charge for a loan is bounded and checked by the firm, federal definition of "interest" advanced by petitioner. With that definition, it would be easy to determine whether a home state's "rate" comported with the will of Congress. If, however, as the Colorado court has held, Delaware can broaden the meaning of "interest" so as to determine what credit terms are lawful, then Delaware would be engaged in lawmaking for the entire nation. As here, Delaware would be defining not just an objective rate required for a loan, but also the actual rights and liabilities (*e.g.*, what does "late" mean; are attorneys' fees collectible) affecting citizens of other states. Nothing would stop Delaware from authorizing lenders to charge "as interest" attorneys fees, court costs, foreclosure costs, collection costs or any other loan-related term which might arguably impact a lender's total return on its loans. Congress could not have intended to delegate its national lawmaking power in such a manner.

[11] Only Congress has open-ended discretion to choose the object and ends of national legislation. *See* L. Tribe, *American Constitutional Law*, § 5-17 at 363 (2d ed. 1988). Congress may not authorize individual states to choose between different legislative needs or to substitute the will of a state legislature for that of Congress where such state decisions will have an impact nationally or on residents of other states:

> Congress cannot simply delegate to the states the power to legislate in areas that are reserved to Congress – e.g., powers under the interstate commerce clause – but Congress may by federal legislation adopt and incorporate by reference state laws that already exist or that may exist in the future. For example, *Congress cannot delegate to Illinois the power to legislate federal pollution standards for the whole country. Then Congress would be abdicating interstate commerce control to one state to legislate for the entire nation.*

1 R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law – Substance and Procedure*, § 12.6 at 644 (1986) (emphasis added). *See also Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

To allow Delaware law to define "interest" in § 85 and, in turn, the preemptive scope of the statute, is to allow that state to substitute its will for the will of Congress. The decision whether "interest" includes liquidated damages, attorneys fees, court costs or other contractual penalties is "quintessentially one of legislative policy" that should be made by Congress, not by an individual state legislature that is unaccountable to the will of the nation. *See Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist J., concurring). Residents of Colorado and other affected states have no voting opportunity to influence the legislators in Delaware. Absent accountability, the lower court's unlimited linkage of preemption to the loan terms authorized by a bank's home state would constitute a serious violation of the principles embodied in Articles I and IV of the Constitution. *Cf. Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).[12]

Unless § 85 is read with reference to the common law so as to exclude late fees from the definition of "interest," each state could give a different meaning to the term. Each state, by making "interest" mean whatever it wanted, could determine the scope of federal preemption and extend its own lending laws into other states without limit. This Court has recognized that danger before. In *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), the Court considered whether federal or state law defined the term "branch" in the National Bank Act. The Court stressed that permitting state legislatures to define the federal term "branch" would "make them the sole judges of their

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[12] In *Florida Lime*, this Court refused to find a California law preempted where residents of that state had no real opportunity to participate in the process which resulted in the federal regulation that allegedly superseded California's law. Here, too, Colorado residents have had no opportunity to participate in the process that allegedly has resulted in Delaware law preempting Colorado law.

own powers," and that Congress "did not intend such an improbable result." *Id.* at 133-34. Here, too, Congress did not intend for Delaware to define the scope of federal preemption and thereby be the sole judge of its own power. The Colorado Supreme Court's ruling conflicts with these principles and should be reviewed immediately.

C. The Decision Below Disregards the Preemption Issue, Misconstrues the Most Favored Lender Doctrine and Improperly Expands the Common Law Definition of "Interest."

Remarkably, the Colorado Supreme Court concluded that "this case does not raise a preemption issue." (App. 6, n. 4). The court explained:

> The incorporation here of Delaware law has an incidental effect on enforcement of a provision of the Colorado UCCC when a Colorado resident, such as Copeland, chooses to obtain a loan from MBNA. That fact, however, does not amount to a showing of preemptive effect. Congress has made no attempt either to interfere with Colorado's regulation of state chartered banks or to occupy the field of consumer loans.

(*Id.*).

In concluding that a preemption analysis does not even apply, the Colorado court apparently misunderstood the guidelines established for implied conflict preemption in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). In *Rice*, this Court instructed that unless there is an actual, not just hypothetical, conflict between state and federal law, there can be no preemption. *Id.* at 659. The Court did not conclude that the absence of a direct conflict precludes preemption analysis, as the Colorado court apparently believed. The Court reasoned instead that where there is

no actual conflict, but merely an "incidental effect," preemption is the issue but not the result. Thus, in accordance with *Rice*, instead of treating the case as one that does not raise preemption issues, the lower court should have held outright that § 85 does not preempt Colorado's regulation of late fees because there is no actual conflict between federal law and Colorado law.

In fact, the Colorado court's decision disregards even the most basic preemption principles. As this Court has held time and again, there is a strong presumption *against* federal preemption of state law. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As a result of that presumption, " 'the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the *clear and manifest purpose* of Congress.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (plurality opinion) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Unless a state law "incapacitates the [national] banks from discharging their duties to the government," there will be no preemption. *McClellan v. Chipman*, 164 U.S. 347, 357 (1896). *Accord Sherman* (App. 55).

Here, the Colorado court recognized that neither § 85 nor the legislative history contain any clear statements of Congressional intent to preempt state regulation of late fees. Nevertheless, the court held that if Congress had intended to limit preemption to numerical percentage rates it would have said so. (*See* App. 15). In other words, according to the court below, whenever Congress enacts a federal statute, if it is silent with respect to the scope of preemption, it intends to preempt everything not mentioned. That analysis directly conflicts with the standards set forth in *Cipollone*, *McClellan* and dozens of other decisions by this Court.

Nor does *Marquette* support an expansive reading of federal preemption principles, as inferred by the court below. *Marquette* established a firm, federal definition of

the word "located" in § 85, holding only that a national bank may export its home state's *rate* of interest. *See* 439 U.S. at 313-14. Since Delaware's definition of the components of interest has nothing to do with the unlimited *rate* at which interest is allowed in that state, *Marquette* provides no basis for exporting Delaware's definition of interest. *See Sherman* (App. 59). MBNA may still charge the unlimited rates allowed by its home state when it solicits consumers in Colorado and other states. It may not, however, impose a separate, sum-certain penalty fee which is neither a "rate" based on the time value of the money owed nor "interest." Because Colorado law, as alleged by cardholder, does not limit the amount of MBNA's "interest rates," but only the form of MBNA's non-interest charges, it does not conflict with § 85.

The lower court's decision also directly conflicts with the common law interpretation of federal statutes mandated by this Court. This Court recently reaffirmed the strong presumption of a common law meaning for words used in a federal statute in *United States v. Texas*, 113 S. Ct. 1631 (1993). In that case, which likewise considered the meaning of "interest" in a federal statute, the Court instructed:

> "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles". . . . In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

113 S. Ct. at 1634 (citations omitted); *see also United States v. Shabani*, 115 S. Ct. 382, 384 (1994). The Court also distinguished between interest and penalties (including late fees) and found that penalties are "more onerous than the common law" of prejudgment interest. 113 S. Ct. at 1635-36 ("Unlike the common law, § 3717 also imposes processing fees and penalty charges"). Penalties cannot

be "more onerous" than interest if they are one and the same, as the Colorado court incorrectly held below.

The lower court also erroneously assumed that Congress, by its silence, intended to change the common law when it used the word "interest" in § 85. Because § 85 does not " 'speak directly' to the question addressed by the common law," however, it does not abrogate that common law. *Id.* at 1634. Therefore, Congress must have intended that "interest" in § 85 be construed uniformly based on the ordinary, common law meaning of the term. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

Congress was fully aware of the ordinary, common law differences between late charges and interest when it passed the National Bank Act in 1864.[13] On at least three occasions before passage of the Act, this Court had already held that sum-certain contingent default charges, like late fees, were not "interest." For example, in *Tayloe v. Sandiford*, 20 U.S. (7 Wheat.) 13 (1822), the Court recognized that "[i]n general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. . . . " *Id.* at 17. Later, in *Lloyd v. Scott*, the Court held:

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[13] Even the context of the language demonstrates that Congress understood that "interest" is compensation related to the time value of money. Though § 85 permits a national bank to charge interest at the highest "rate" allowed to any lender in its home state, the statute does not authorize the bank to impose late fees or any type of lending charge other than an interest "rate." In fact, the term "rate" appears in the statute at least nine times, and it always refers to a charge that is related to the passage of time. In contrast, § 86 of the Act provides that where an excessive rate has been charged, the borrower may recover damages in an "amount" equal to twice the interest paid. Unlike the term "rate" in § 85, the term "amount" in § 86 refers to sum-certain damages or penalties that are totally unrelated to the passage of time. *See First Nat'l Bank of Charlotte v. Morgan*, 132 U.S. 141, 144-45 (1889) (§ 86 case where this Court recognized a material difference between compensatory "interest" and deterrent or punitive "penalties").

> If a party agree [sic] to pay a specific sum, exceeding the lawful interest, provided he do [sic] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, *which is considered as a penalty.*

29 U.S. (4 Pet.) 205, 226 (1830) (emphasis added). Likewise, just one year before enactment of the National Bank Act, the Court stated with respect to any contingent charge:

> The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious.

Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863). Because Congress also was well aware that "[t]he popular or received import of words furnishes the general rule for the interpretation of public laws," *Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853), it must have used the term "interest" as it was ordinarily understood at common law to exclude contingent, sum-certain penalties imposed in addition to continuing finance charges.[14]

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[14] Ancient law also shows that "interest" and sum-certain contract penalties are not the same. At Roman law, the only "interest" that was allowed was that measured by time following a default. In effect, "*interesse*" (interest) and penalties were the same. But the measure of the "interest" (then called penalty) was based on the unpaid balance and measured by time. Any greater amount was a classic contract penalty ("*nomine paenoe*") that was "relievable against in equity." *See* R. Comyn, *Treatise on the Law of Usury*, pp. 73-74 & n.(a) (R. Pheney, London 1817); *see also Library of Congress v. Shaw*, 478 U.S. 310, 315 n.2 (1986). Today, as in Roman times, "interest" following a loan default is likewise limited and must be measured by the "*id quod interest*" (that which is between) standard. *See Shaw*, 478 U.S. at 315 n.2. Although "interest" for a loan or forbearance is now allowed as well (at Roman times such interest was not lawful), the time

At common law, "special damages" that more than compensated a lender for the time-value of money were prohibited. For example, in *Loudon v. Taxing District*, 104 U.S. (14 Otto) 771 (1881), a borrower defaulted, requiring the lender to sell his own assets at a substantial discount. The lender sued for the "costs" of the default. The issue was whether the borrower was liable for more than the time-value of the lender's money. This Court held that interest measured by time is the *only* damage allowed:

> *[A]ll damages for delay* in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.

Id. at 774 (emphasis added). *See also New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (a party "cannot recover special damages for the detention of money due to him beyond what the law allows as interest").

The court below turned the reasoning of this common law upside down. Instead of holding that "interest" based on the unpaid balance and the passage of time is the "measure of all such damages," the court effectively found that additional, sum-certain "penalties" are the measure of all "interest." That holding completely disregards the guidelines established by this Court in *United States v. Texas, Tayloe v. Sandiford, Lloyd, Spain, Loudon* and *Piaggio*.

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measurement for default charges persists. *See id.* If a time measurement is absent, the default charge is a contract penalty or forfeiture, because the amount is presumed to exceed the time value of money. *See Meilink v. Unemployment Resources Comm'n*, 314 U.S. 564, 570 (1942); *see also Merchants' Nat'l Bank v. Sevier*, 14 F. 662, 663, 667-75 (C.C.E.D. Ark. 1882) (National Bank Act case surveying the differences between the common law of penalties and statutory usury principles).

To be sure, "interest" in § 85 may include "damages" paid after a loan default, such as back-end charges to compensate the lender for the time value of its money. Those "damages" that are based on an unpaid balance and measured by time may be "interest in the nature of damages." But contingent sum-certain charges like credit card late fees, attorneys fees, return check fees and over-limit fees, because they are neither based on the unpaid balance nor measured by time, are not "interest in the nature of damages." *See Meilink v. Unemployment Resources Comm'n*, 314 U.S. 564, 570 (1942) (the distinction that a "penalty is a fixed ad valorem amount taking no account of time, and interest which does depend on time, is persuasive"). Thus, as this Court has recognized, where a sum-certain default charge is contingent (not required for the loan or forbearance) and is not related to time or the unpaid balance, it is a contract penalty rather than "interest in the nature of damages." *See United States v. Childs*, 266 U.S. 304, 307 (1924) ("[a] penalty is a means of punishment; interest a means of compensation"). At common law, such a penalty was against public policy and unenforceable. *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) ("But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced"). The decision below conflicts with these common law principles and improperly allows one state's legislative decisions to preempt the contract laws of other states.

D. The Lower Court Erroneously Deferred to the OCC's Contradictory Interpretations of "Interest" in § 85.

The Colorado court also erred in giving deference to the OCC's inconsistent interpretation of "interest" under § 85. Though the views of an agency charged with the administration of a statute may be afforded some deference, as this Court instructed in *INS v. Cardoza-Fonseca*,

480 U.S. 421, 441 n. 30 (1987), far less deference is appropriate when the agency's interpretations have been inconsistent. *Accord Sherman* (App. 71). Here, the OCC has issued conflicting analyses repeatedly.

In 1964, for example, the Comptroller of the Currency himself issued a formal letter that addressed the meaning of "interest" in § 85 and opined that *"[c]harges for late payments . . .* are illustrations of charges which are made by some banks which *would not properly be characterized as interest."* OCC Letter, James Saxon, Comptroller of the Currency (June 25, 1964) (emphasis added).[15] *See Sherman* (App. 72). For the next twenty-four (24) years, the Comptroller's 1964 interpretation remained the view of the OCC. However, in 1988, the OCC staff took a different approach. In an informal opinion letter, the deputy chief counsel for the OCC concluded that "interest rate" in § 85 is defined by the law of a bank's home state, and if the state definition includes late fees or even attorneys fees, then "interest" in § 85 includes late fees and attorneys fees. Letter from Robert Serino, OCC Deputy Chief Counsel, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 at 78,064 (Aug. 11, 1988).[16] Then, in 1995, taking yet another approach, an OCC attorney wrote that federal law, not state law, provides the definition of "interest" in § 85, and that under federal law, "interest" includes all expenses and charges related to a

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[15] Ignoring this letter from the Comptroller himself, the Colorado court for some unknown reason instead cited 12 C.F.R. § 7.7378. That regulation, which provides that "[a] national bank may issue credit cards, either directly or through a subsidiary corporation," is irrelevant to the question of whether or not late fees are "interest" under § 85.

[16] In the past, the OCC has represented to this Court that informal staff letters written by OCC deputies or staff lawyers are neither binding nor entitled to deference. *See* OCC's *amicus curiae* brief filed in *Nationsbank, N.A. v. Variable Life Ins. Co.*, 115 S. Ct. 810 (1995).

loan. Letter from Julie L. Williams, OCC Chief Counsel, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Feb. 17, 1995).[17] These conflicting analyses, among others,[18] demonstrate that the OCC's views do not warrant the deference afforded by the court below. *See Sherman* (App. 70-74).

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[17] The Williams letter violated the Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 328, 103d Cong., 2d Sess., § 114, 108 Stat. 2367 (Sept. 29, 1994), *as codified at* 12 U.S.C. § 43. That statute makes it clear that the OCC cannot issue an opinion concluding that state law is preempted unless it first follows certain stringent publication procedures. *See* 12 U.S.C. § 43. The OCC did not follow those procedures in issuing the Williams letter. *See* H. Conf. Rep. No. 651, 103d Cong., 2d Sess. (1994) *reprinted in* 1994 U.S.C.C.A.N. 2039.

[18] The OCC has even changed its analysis during the course of this case. When this litigation began, the OCC maintained that the term "interest" in § 85 had to be defined pursuant to the law of a bank's home state. *See* [1988-89] Fed. Banking L. Rep. ¶ 85,676 (opining that the law of a bank's home state defines "interest" in § 85). Now, the OCC contends, as petitioner has argued all along, that federal law must define the term. *See* [1994-95] Fed. Banking L. Rep. ¶ 83,618 (opining that federal law defines "interest"). The OCC has even conceded in recent *amicus* briefs below that certain of its informal opinion letters concluding that late fees are "interest" "overstate the role of state law." Also, in direct response to this and related litigation, the OCC, on March 3, 1995, issued a notice of a proposed interpretive rulemaking. *See* 60 Fed. Reg. 11924-41 (1995) (to be codified at 12 C.F.R. § 7.4001) (proposed Mar. 3, 1995). The proposed interpretive rule will interpret "interest" in § 85 to include late fees. The proposed rule has never become final, however, and it has drawn strenuous opposition from senators, banks and consumer organizations.

E. Review Is Necessary to Provide Guidance to States, Banks, Consumers and the Lower Courts.

The question of whether "interest" in § 85 can be defined by state law to include contract penalties is one of national importance to consumers, each of the fifty states and numerous national banks throughout the country. Back in 1992, Massachusetts and twenty-seven states asked this Court to review almost the exact same issues and to reverse a lower court decision finding preemption in *Massachusetts v. Greenwood Trust Co.*, 113 S. Ct. 974 (1993) (denying certiorari).[19] Though the Court declined to review the matter at that time, the controversy has not gone away. In fact, litigation is now pending nationwide.

The sheer number of cases pending, the conflicting opinions and the four petitions for certiorari (five, counting *Hunter*) now before the Court demonstrate the national significance of the issues and the urgent need for guidance from this Court. Until the Court decides the questions raised here, the controversy will continue, draining the pockets of consumers and litigants and the resources of the courts. To attract major credit card operations, state legislators will continue their race to the bottom in consumer protection by defining "interest" to embrace countless fees, including court costs and even attorneys' fees. National banks located in those states will continue to export the contract penalties in violation of other states' laws, and consumers will continue to suffer from the unlawful practice.

Just as these issues recently have been deemed appropriate for discretionary review by the supreme courts of New Jersey, Pennsylvania, California and Colorado, they are even better suited for review by this Court. Where, as here, there are unsettled issues of federal and

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[19] The only difference was that the *Greenwood* case involved the definition of "interest" in § 521 of DIDA.

constitutional law causing grave concern and expense to every state and to consumers nationwide, the conflicting opinions of state supreme courts should not be the last word on these issues. Because this case presents important and urgent questions of federal law, this Court should grant certiorari and decide the issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 28, 1995

SUPREME COURT, STATE OF COLORADO
NOVEMBER 20, 1995
NO. 94SC409

BRIAN K. COPELAND, on behalf of himself and all others similarly situated, Petitioner,

v.

MBNA AMERICA BANK, N.A., Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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JUSTICE MULLARKEY delivered the Opinion of the Court. JUSTICE SCOTT does not participate.

We granted certiorari to review the court of appeals' decision in *Copeland v. MBNA Am., N.A.*, 883 P.2d 564 (Colo. App. 1994).[1] The court of appeals held that section 85 of the National Bank Act, 12 U.S.C. § 85 (1982), preempted a Colorado consumer protection law, thereby,

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[1] We granted certiorari on the following three issues:
1. Does the term "interest" in section 85 include contingent penalty charges (late fees), which were not considered "interest" at common law, so as to preempt Colorado's prohibition and regulation of such charges on revolving credit accounts?
2. Did Congress intend for Delaware's legislative definition of "interest rate" to displace Colorado's consumer protection and common law prohibiting late fees on revolving credit accounts?
3. Could Congress constitutionally delegate to Delaware the power to define the federal lending term "interest" for all fifty states, including Colorado, so as to preempt other states' laws?

allowing a national banking association, located in Delaware, to charge a Colorado credit cardmember "interest" in the form of a "late payment fee." We affirm the judgment of the court of appeals, but we base our decision on different grounds.

I.

Respondent, MBNA America Bank, N.A. (MBNA), is a national banking association chartered by the United States Office of the Comptroller of the Currency (OCC) and governed by the National Bank Act (NBA), 12 U.S.C. § 85 (1982). The NBA requires MBNA to file an organization certificate. MBNA's organization certificate lists Delaware as "[t]he place where its operations of discount and deposit are to be carried on. . . . ," 12 U.S.C. § 22 (1989), and its state of incorporation.

MBNA issues credit cards under the VISA and MasterCard service marks. The credit cards permit MBNA to lend money on an open-end credit basis to borrowers throughout the United States. The terms and conditions governing the use of its credit cards are set forth in a cardmember agreement (Agreement). The Agreement provides that a cardmember must make a specified minimum monthly payment on the account's outstanding balance, and failure to do so by the due date constitutes default. The Agreement further provides for the imposition of a fifteen dollar late payment fee[2] if the specified

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[2] Banking associations also refer to a late payment fee as a contingent penalty fee, delinquency charge, or non-periodic interest charge.

minimum payment is not paid within twenty-five days of the due date. MBNA does not include late payment fees in the computation of its annual percentage rate, and separately identifies finance charges and late payment fees on the monthly billing statement.

Petitioner, Brian K. Copeland (Copeland), a Colorado resident, became a MBNA VISA cardmember in 1988. Copeland used his VISA credit card to purchase goods and services in Colorado. In March 1992, Copeland failed to pay his VISA minimum monthly payment, and MBNA assessed a fifteen dollar late payment fee to his VISA credit card account.

Copeland initiated this class action, on behalf of himself and all others similarly situated, seeking injunctive relief and damages under Colorado statutory and common law. Specifically, Copeland alleges that MBNA violated section 5-3-203 of the Colorado Uniform Consumer Credit Code (UCCC), § 5-3-203, 2 C.R.S. (1992), by imposing a late payment fee in addition to a finance charge on his VISA credit card account. Copeland contends that the UCCC prohibits banking associations, both state and national, from charging a late payment fee to the credit card account of a Colorado resident.

In response, MBNA asserts that section 85 of the NBA, 12 U.S.C. § 85 (1982), preempts section 5-3-203 of the UCCC, § 5-3203, 2 C.R.S. (1992).[3] MBNA maintains that the NBA allows national banks to assess "interest" in

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[3] MBNA made an unsuccessful attempt to remove this case to federal court on federal question jurisdiction. *See Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537 (D. Colo. 1993).

the form of a late payment fee if allowed by the state listed in the national bank's organization certificate. Because the Delaware Banking Statute (Delaware Statute), Del. Cod. Ann. tit. 5, § 950 (1993), has defined a late payment fee as a form of "interest," MBNA asserts that, as a national bank located in Delaware, it can charge "interest" in the form of a late payment fee to a Colorado resident.[4]

The district court granted MBNA's motion for judgment on the pleadings and dismissed the complaint. The court of appeals affirmed the dismissal, and we granted certiorari. We conclude that, as a matter of federal law, the fifteen dollar late payment fee imposed on Copeland's VISA credit card account is a form of "interest" under section 85 of the NBA. Because MBNA is a national bank located in Delaware, and Delaware law permits the imposition of a late payment fee, MBNA can charge

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[4] Althouqh Copeland and MBNA frame their arguments in terms of preemption, as is consistent with the wording of certiorari issues one and three, this case does not raise a preemption issue. In the NBA, Congress has chosen to define the federal law by incorporating state law, a frequently used technique. The NBA directs that a nationally chartered bank may charge interest on loans as permitted by the bank's home state. The incorporation here of Delaware law has an incidental effect on enforcement of a provision of the Colorado UCCC when a Colorado resident, such as Copeland, chooses to obtain a loan from MBNA. That fact, however does not amount to a showing of preemptive effect. Congress has limited its regulation in the NBA to nationally chartered banks and has made no attempt either to interfere with Colorado's regulation of state chartered banks or to occupy the field of consumer loans. The second certiorari issue is dispositive of this case.

Copeland a late payment fee despite the fact that Colorado prohibited such fees.

II.

In April 1992, the month MBNA charged a late payment fee to Copeland's VISA credit card account, section 5-3-203 of the UCCC prohibited banks from assessing late payment fees on revolving credit accounts, such as VISA credit cards. The UCCC provided, in relevant part:

> (5)(a) Except as provided in paragraph (b) of this section (5), with respect to a consumer loan, refinancing, or consolidation which is not precomputed, including a revolving loan account, the parties *may contract for a delinquency charge* on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the installment or ten dollars; *except that the provisions of this paragraph (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.*

§ 5-3-203, 2 C.R.S. (1992) (emphasis added).[5]

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[5] In 1993, the Colorado General Assembly amended section 5-3-203 of the UCCC to allow banks to impose a late payment fee on credit card accounts in Colorado. The amended section provides, in part:

> The parties to a revolving loan account for which a lender credit card is issued which is not secured by an interest in land *may contract to impose a delinquency charge* on any minimum payment due in connection with a billing cycle that remains unpaid ten days after

Unlike Colorado, at the time this case arose, Delaware statutorily allowed its banks to charge late payment fees at the rate of fifteen dollars per billing cycle. Section 950 of the Delaware Statute provides:

> If the agreement governing a revolving credit plan so provides, *a bank may impose, as interest, a late or delinquency charge* upon any outstanding unpaid installment payments or portions thereof under the plan which are in default. . . . No delinquency charge shall exceed fifteen dollars.

Del. Cod. Ann. tit. 5, § 950 (1993) (emphasis added).

However, MBNA's banking activities are governed by the NBA, which provides in section 85:

> *Any association [national bank] may take, receive, reserve, and charge* on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at the rate allowed by the laws of the State . . . where the bank is located.*

12 U.S.C. § 85 (1982) (emphasis added).

III.

We must decide if late payment fees are a form of "interest" under section 85 of the NBA. To answer that question, we turn to the well-established rules of federal statutory interpretation. First, we look at the statutory language itself. *United States v. Turkette*, 452 U.S. 576, 580

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such minimum payment's scheduled due date. . . . No delinquency charge shall exceed fifteen dollars.

§ 5-3-203, 2 C.R.S. (1995 Supp.) (emphasis added). However, this amendment does not apply to the case before us.

(1981). Where the statutory language is clear and certain, the statute should be construed as written, because the function of the court, in such a case, is to enforce the statute according to its terms. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Where, however, the statutory language is ambiguous or unclear, resort to legislative history is appropriate in order to arrive at an interpretation that effectuates legislative intent. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Moreover, wherever practicable a statute should be interpreted in a manner that gives effect to all its provisions and policy objectives, and not in a way that renders one or more of its parts or goals inoperative. *Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Section 85 of the NBA does not provide a definition for the term "interest" or "interest at the rate." 12 U.S.C. § 85 (1982). Copeland suggests that the term "interest" should be defined narrowly only to include numerical periodic percentage interest rates. Copeland argues that at common law the term "interest" did not include penalty fees and that a late payment fee is a penalty fee. In support, Copeland refers to Webster's International Dictionary, which defines "interest" as "the price paid for borrowing money generally expressed as a percentage of the amount borrowed in one year." *Webster's Third New International Dictionary*, 1104 (3rd ed. 1986).

On the other hand, MBNA suggests that we define the term "interest" broadly to include a wide variety of banking fees, including late payment fees. MBNA argues that historically the term "interest" included penalty fees. In support, MBNA refers to the *Oxford English Dictionary*, which defines "interest" as the "amount paid as a penalty

for failure to repay a sum of money on time." Oxford English Dictionary, 739 (10th ed. 1990). MBNA contends that Copeland's use of the term "interest" as a numerical periodic percentage rate does not accurately reflect the historical use of the term. We conclude that the common dictionary definitions are not sufficiently precise to settle the question before us.

Given that the statutory language is not clear with respect to whether a late payment fee is a form of "interest," we next look to the legislative history of the NBA. The Civil War Congress enacted the NBA in 1864. Until the enactment of the NBA, state regulations had controlled the nation's banking industry. The goal of the NBA was to create a centralized federal national banking system which would facilitate interstate commerce by issuing a reliable form of currency.[6] *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 536-39 (1869). The purpose of enacting the NBA was to allow the federal government to raise funds for the Union's war efforts. *See* Cong. Globe, 38th Cong., 1st Sess. 1257 (1864) (remarks of Representative Hooper) ("[T]he national bank act . . . [was] recommended by the Secretary of the Treasury as [a measure] to

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[6] Congress previously attempted to create a national banking system with the establishment of the First and Second Banks of the United States in 1791 and 1816, respectively. However, the two banks were short lived, falling victim to the ongoing political struggle between advocates of a strong central government and advocates of "state rights." President Madison permitted the First Bank's charter to expire in 1811. President Jackson vetoed the Second Bank's re-charter in 1832. *Tiffany v. National Bank*, 85 U.S. (18 Wall.) 409 (1873).

be relied upon to carry the nation through the financial difficulties of this war.").

Since the legislative history does not directly address whether late payment fees are a form of "interest," we look to court interpretation of section 85 of the NBA. The United States Supreme Court first construed section 85 of the NBA in *Tiffany v. National Bank*, 85 U.S. (18 Wall.) 409 (1873). There, the court announced what became known as the "most favored lender" doctrine. The court reasoned that in order to create a centralized federal national banking system, Congress needed to protect the newly created national banks from unfair treatment by state legislatures. Hence, section 85 of the NBA allowed a national bank to charge interest on a loan at the same rate allowed to state regulated lenders in the national bank's home state. *Id.* In *Tiffany*, the Court allowed a national bank located in Missouri to charge the same interest rates chargeable by natural persons under Missouri law. *Id. See Fisher v. First Nat'l Bank*, 548 F.2d 255, 258 (8th Cir. 1977) ("[S]ection 85 was designed by Congress to place national banks on a plane of at least competitive equality with other lenders in the respective states, and indeed, to give to national banks a possible advantage over state banks in the field of interest rates.").

The United States Supreme Court continued its interpretation of section 85 of the NBA in *Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978). There, the court announced what became known as the "exportation principle." The court reasoned that in order to give national banks a competitive advantage over state banks, national banks were allowed to charge borrowers in another state the interest rate set by their

home state. *Id.* In *Marquette*, the court held that a national bank chartered in Nebraska could charge its Minnesota credit card customers an interest rate that was allowed under Nebraska law, but was higher than the rate allowed by Minnesota usury laws. *Id.*

Over the years, courts faced with interpreting section 85 of the NBA uniformly have taken an expansive view of the term "interest." These courts have included numerous banking charges other than numerical periodic percentage interest rates as a form of "interest." As the banking industry evolved, the term "interest" was defined to include banking charges related to loans, mortgages, and credit cards and has specifically included overdraft charges, transaction fees, and annual fees. *See Citizens' Nat'l Bank v. Donnell*, 195 U.S. 369, 373-74 (1904) (overdraft charge); *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 790 (9th Cir. 1982) (compensating balance requirement); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-61 (8th Cir. 1977) (cash advance fee); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 863 (6th Cir. 1972) (closing costs); *Northampton Nat'l Bank v. Attorney General*, 397 N.E.2d 1149 (Mass. App. Ct. 1979) (annual fee).

IV.

From the above examination, it is apparent that a national bank can charge a variety of banking fees, as forms of "interest," to credit cardholders in other states if allowed by the national bank's home state. We are persuaded for the following reasons that late payment fees are a form of "interest" under section 85 of the NBA.

First, contrary to Copeland's theory, there is sufficient authority to allow us to conclude that a form of late payment fees was included in the definition of the term "interest" at the time the NBA was enacted. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986) ("The institution of interest originated under Roman law as a penalty due from a debtor who delayed or defaulted in repayment of a loan."); *Shoemaker v. United States*, 147 U.S. 282, 321 (1893) ("Interest includes damages, by reason of the failure of the debtor to pay the principal when due."); *United States v. North Carolina*, 136 U.S. 211, 216 (1890) ("Interest . . . is allowed by the courts as damages for the detention of money . . . or of compensation, to which the [lender] is entitled."); *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884) ("Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor."); *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1873) ("Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention.").

Second, we give deference to the various OCC administrative opinions and rulings interpreting late payment fees as a form of "interest" under section 85 of the NBA. 12 C.F.R. § 7.7378 (1971). The OCC, a branch of the United States Treasury Department, is responsible for administration of the NBA. The OCC has authorized national banks to engage in credit card programs as an exercise of the lending powers granted to them under the NBA which allows them to lend money on personal security. 12 U.S.C. § 24 (1989). The OCC consistently has taken the position that late payment fees are "interest" under

both section 85 of the NBA and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), 12 U.S.C. § 1831d (1980).[7] Because the OCC is charged with administering the NBA, its opinions and rulings are entitled to substantial deference. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403 (1987). Moreover, this deference is particularly appropriate because national banks have designed their interstate credit card programs under the OCC's guidance. *Independent Bankers Ass'n v. Marine Midland Bank, N.A.*, 757 F.2d 453, 461 (2d Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986).

Third, we believe Congress' recent enactment of the DIDA, although certainly not dispositive, lends support that late payment fees are a form of "interest" under section 85 of the NBA. In 1980, Congress enacted the DIDA to regulate FDIC insured state chartered banks. Congress incorporated the language of section 85 of the NBA into section 521 of the DIDA. Section 521 states in part:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates . . . such State bank . . . *may take, receive, reserve, and charge* on any loan or discount, or upon any note, bill of exchange, or other evidence of debt, *interest at a rate . . . allowed by the laws of the State . . . where the bank is located.*

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[7] Section 85 of the NBA governs federally-chartered and insured national banks and is administered by the OCC. Section 521 of the DIDA governs state-chartered banks and is administered by the Federal Depository Insurance Corporation (FDIC). *See* 12 C.F.R. § 7.7378.

12 U.S.C. § 1831d (1980) (emphasis added). Like the NBA, the term "interest" or "interest at a rate" is not defined in section 521 of the DIDA. Generally, similar language should be interpreted in the same manner, unless the context requires different interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Further, Congress is presumed to be aware of judicial interpretations of statutory language when it intentionally incorporates the language of one statute into another statute. *Id.* The language and legislative history of section 521 of the DIDA grants federally insured, state chartered banks the same interest authority as national banks. We believe that had Congress intended to define "interest" with a narrow definition of numerical periodic percentage rates, it would have provided that definition in section 521 of the DIDA. Because Congress did not act to the contrary of the vast majority of court decisions, we are persuaded that late payment fees are "interest" under section 85 of the NBA.

Finally, we are persuaded by the reasoning of the many courts that have interpreted late payment fees as a form of "interest." Prior to 1992, courts had not directly addressed the issue whether late payment fees were "interest" under section 85 of the NBA or section 521 of the DIDA. At present, the issue has been examined by several courts.[8] The overwhelming majority of the decisions concluded that late payment fees charged to credit

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[8] In these cases, customers have challenged various banking fees assessed by both national banks and FDIC insured state chartered banks. The courts have decided whether various banking fees are forms of "interest" under both section 85 of the NBA and section 521 of the DIDA.

card customers, like the charge in dispute here, are "interest" under section 85 of the NBA and section 521 of the DIDA which can be exported to other states by a national or FDIC insured state chartered bank. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 974 (1993); *Watson v. First Union Nat'l Bank*, 837 F. Supp. 146 (D.S.C. 1993); *Goehl v. Mellon Bank*, 825 F. Supp. 1239 (E.D.Pa. 1993); *Tikkanen v. Citibank (SD), N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Hill v. Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992); *Nelson v. Citibank, N.A.*, 794 F. Supp. 312 (D. Minn. 1992); *Smiley v. Citibank (SD). N.A.*, 900 P.2d 690 (Ca. 1994); *Sherman v. Citibank (SD), N.A.*, 640 A.2d 325 (N.J. Super. Ct. App. Div. 1994) *cert. granted*, Oct. 24, 1994.

The United States Court of Appeals for the First Circuit was the first court to define late payment fees as a form of "interest." *Greenwood*, 971 F.2d at 831. There, the court of appeals reversed the district court and held that a Massachusetts statute prohibiting the imposition of late fees on credit card customers was preempted by the DIDA. In *Greenwood*, a national bank located in Delaware was allowed to charge late payment fees to Massachusetts residents. *Id.*

The Supreme Court of California was the first state supreme court to examine the issue. *Smiley*, 900 P.2d at 691. There, the court affirmed the court of appeals' decision holding that the term "interest" in section 85 of the NBA can be construed to cover late payment fees if such fees are allowed by the national bank's homestate. *Id.* In *Smiley*, a national bank located in South Dakota was allowed to charge a California resident a late payment fee as a form of "interest." *Id.*

To date, the only jurisdiction to conclude that the term "interest" does not include late fees is the Superior Court of Pennsylvania. In two cases, *Mazaika v. Bank One*, 653 A.2d 640 (Pa. Super. 1994), and *Gadon v. Chase Manhattan Bank*, 653 A.2d 697 (Pa. Super. 1995), the court held that late fees, annual fees, check return charges, and over-credit-limit charges were subject to Pennsylvania's consumer protection and usury statutes in that the DIDA only preempted state law to the extent of its narrow definition of "interest" as an annual percentage rate. In light of our prior examination, we reject this court's interpretation of "interest."

V.

We conclude that the NBA's purpose and legislative history compel a finding that late payment fees are a form of "interest" under section 85 of the National Bank Act. As such, MBNA is allowed to charge late payment fees to Colorado residents. Accordingly, we affirm the judgment of the court of appeals.

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC409
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA1191
DISTRICT COURT, CITY AND COUNTY OF DENVER, 92CV3909

ORDER OF COURT

BRIAN K. COPELAND, on behalf of himself and all others similarly situated,

Petitioner,

v.

MBNA AMERICA, N.A.,

Respondent.

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioner's Opening Brief shall be filed within forty days from this date;

(b) Respondent's Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner's Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The summary of the issues as announced by the Court this day is as follows:

Whether the term "interest" in 12 U.S.C.A. § 85 (1989) includes contingent penalty charges (late fees), which were not considered "interest" at common law, so as to preempt Colorado's prohibition and regulation of such charges on revolving credit accounts.

Whether Congress intended Delaware's legislative definition of "interest rate" to displace Colorado's consumer protection and common law prohibiting late fees on revolving credit accounts.

Whether Congress may constitutionally delegate to Delaware the power to define the federal lending term "interest" for all fifty states, including Colorado, so as to preempt other states' laws.

BY THE COURT, EN BANC, OCTOBER 24, 1994.
JUSTICE SCOTT does not participate.

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COLORADO COURT OF APPEALS May 26, 1994
No. 93CA1191

Brian K. Copeland, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

MBNA America, N.A.,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver

Honorable Connie L. Peterson, Judge
No. 92CV3909

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE MARQUEZ
Plank and Rothenberg, JJ., concur

Bader & Villaneuva, P.C. Gerald L. Bader, Jr., Jeffrey M. Villaneuva, Renee B. Taylor, Denver, Colorado, for Plaintiff-Appellant

Ireland, Stapleton, Pryor & Pascoe, P.C., D. Monte Pascoe, Scot M. Peterson, Denver, Colorado; Sullivan & Cromwell, John L. Warden, Richard J. Urowsky, Lori S. Sherman, New York, New York, for Defendant-Appellee

Davis Graham & Stubbs, William A. Bianco, Denver, Colorado; Wilmer, Cutler & Pickering, Ronald J. Greene, Christopher R. Lipsett, Charles A. Mendels, Craig M. Blackwell, Washington, D.C., Amicus Curiae for Bank of America NT&SA; Bank One, Columbus, N.A; Citibank (South Dakota), N.A.; and Household Bank (Nevada), N.A.

In this action for refund of all delinquency or late payment charges to credit card holders, plaintiff, Brian K. Copeland, on behalf of himself and all others similarly situated, appeals the judgment entered on the pleadings in favor of defendant, MBNA America, N.A. (MBNA). We affirm.

MBNA, a national bank located in Delaware, issues Visa and Mastercard credit cards to customers nationwide. Plaintiff, a Colorado resident and a holder of one of MBNA's credit cards, filed this consumer class action on behalf of himself and all Colorado residents who have been charged late fees on credit cards issued by MBNA.

The late fee is outlined in MBNA's cardmember agreement. Under the agreement, failure to make a minimum payment by 25 days after the payment due date triggers a $15 late payment charge. MBNA, however, does not include late charges in the computation of its annual percentage rate and separately identifies finance charges and late charges on the monthly billing statement.

In his complaint, plaintiff contends that the late fees violate §§5-5-202 and 5-3-203(5)(a), C.R.S. (1992 Repl. Vol. 2) of the Colorado Consumer Protection Code and §6-1-105, C.R.S. (1992 Repl. Vol. 2) of the Colorado Consumer Credit Code and that they have unjustly enriched defendant.

On appeal, the issue is whether §85 of the National Bank Act of 1864, 12 U.S.C. §85 (1988), preempts Colorado law which ostensibly prohibits the late fees of which

plaintiff complains. This question turns on the meaning of "interest" in §85 and the doctrine of preemption.

Section 85 of the National Bank Act allows national banks such as MBNA to charge their credit card customers "interest at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. §85 (1988). For MBNA, that would be the rate allowed by Delaware.

Under Delaware law, interest includes late fees. *See* Del. Code Ann. tit. 5, §§945 and 950 (Supp. 1990). In addition, a national bank may "export" a favorable interest rate from the state in which it is located in transactions with borrowers from other states. *Marquette National Bank v. First Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978); *Hill v. Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992).

I.

Plaintiff, however, contends that the term "interest" as used in §85 does not include late fees and that, thus, MBNA may not export the late fees from Delaware. We disagree.

Quoting from *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), we have previously noted the following about §85 of the National Bank Act:

> 'Several courts . . . have had little trouble in construing the term "interest" to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate. *See, e.g., American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d

781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-61 (8th Cir. 1977) (fee for cash advance); *Panos v. Smith*, 116 F.2d 445, 446-47 (6th Cir. 1940) (taxes and recording fees); *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir.) (bonus or commission paid to lender), *cert. denied*, 290 U.S. 685, 54 S.Ct. 121, 78 L.Ed 590 (1933); *Nelson v. Citibank (South Dakota) N.A.*, 794 F.Supp. 312, 318 (D. Minn. 1991) (late fees).'

Stoorman v. Greenwood Trust Co., ___ P.2d ___, ___ (Colo. App. No. 93CA0224, April 7, 1994); *see Tikkanen v. Citibank (South Dakota) N.A.*, 801 F. Supp. 270 (D. Minn. 1992).

Although *Stoorman* involved interpretation of §521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), 12 U.S.C. §1831d (1988), we noted the similarities between §521 and §85 and relied on cases interpreting §85 of the Bank Act. This definition of interest then is not part of an improper delegation to the states of the power to define interest. *See Tikkanen v. Citibank (South Dakota) N.A. supra.*

Thus, following *Stoorman*, we conclude that the term "interest" under §85 includes late fees.

II.

We turn now to whether §85, as interpreted above, preempts Colorado law that arguably prohibits the late fees charged by MBNA. Plaintiff argues that it does not. We disagree.

At the outset, we note that *Copeland v. MBNA America, N.A.*, 820 F. Supp. 537 (D. Colo. 1993) does not preclude a preemption analysis by this court. While concluding that complete preemption does not provide a basis for federal jurisdiction, the federal district court noted:

> This holding resolves only the *jurisdictional* question of complete preemption and does not prevent MBNA from raising preemption as a defense to Copeland's claims. This court expresses no opinion on that issue.

Copeland v. MBNA America, N.A., supra, 820 F. Supp. at 541 (fn. 5) (emphasis in original). Thus, we turn to the merits of a preemption defense.

The preemption doctrine is derived from the supremacy clause of the United States Constitution. U.S. Const. art. VI, cl. 2. Congress can preempt state law either by expressly declaring that states are precluded from legislating in an area of law, or, if there is no express preemption, state legislation may be preempted as a result of implied preemption or conflict preemption. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Rosa v. Warner Electrical Contracting,* 870 P.2d 1210 (Colo. 1994).

In any preemption analysis, the question whether federal law preempts a state statute is one of congressional intent. *Banner Advertising, Inc. v. People,* 868 P.2d 1077 (Colo. 1994).

Here, we conclude that conflict preemption applies. This form of preemptions implicated when the state law

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Banner Advertising, Inc. v. People, supra.*

The Congress that enacted the original National Bank Act expressly intended to facilitate a national banking system. *Marquette National Bank v. First Omaha Service Corp., supra.*

In *Marquette,* a party argued that the "exportation" of interest rates from a national bank's "home state" into a foreign state would "significantly impair the ability of States to enact effective usury laws." The Supreme Court stated that such impairment "has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." *Marquette National Bank v. First Omaha Service Corp., supra,* 439 U.S. at 318, 99 S.Ct. at 550, 58 L.Ed.2d at 548 (1978).

Moreover, we have already concluded that the Bank Act allows MBNA to charge its credit card customers interest (which includes late fees) at the rate allowed by the laws of Delaware (where interest also includes late fees). Therefore, any Colorado law prohibiting such a charge stands as an obstacle to the accomplishment and execution of the Bank Act.

Thus, as a matter of law, plaintiff's claims are preempted and the complaint was properly dismissed.

The judgment is affirmed.

JUDGE PLANK and JUDGE ROTHENBERG concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

CIVIL ACTION NO. 92 CV 3909 Courtroom 6

ORDER

BRIAN K. COPELAND, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MBNA AMERICA, N.A.,

Defendant

The Court has reviewed the Motion of Defendant MBNA America Bank, N.A. for judgment on the Pleadings filed on May 19, 1993, the Plaintiffs' Response filed June 18, 1993 and the Defendant's Reply filed July 1, 1993.

The Defendant's motion is granted. *H2O Engineering v. Leidy's Inc.* 811 P.2d 38 (Colo. 1991)

It is better to know whether state law is preempted by federal law on the subject issues prior to trial of this large class-action law suit.

Dated this 9th day of July, 1993.

BY THE COURT:

/s/ Connie L. Peterson
CONNIE L. PETERSON
DISTRICT JUDGE

Copies to:

D. Monte Pascoe, Esq.

Gerald L. Bader, Jr., Esq.

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO

Case No. 92-CV-3909, Courtroom ___

CLASS ACTION COMPLAINT

BRIAN K. COPELAND, on behalf of himself and all others similarly situated,

Plaintiff,

v.

MBNA AMERICA (Delaware), N.A.

Defendant.

Plaintiff, by his counsel, alleges upon knowledge with respect to himself and his own acts, and upon information and belief as to all other matters, based in part on the investigation of counsel and publically [sic] available reports and statements as follows:

NATURE OF THE CASE

1. This is a consumer class action, pursuant to the Colorado Consumer Credit Code, Consumer Protection Code, and the common law, brought on behalf of all residents of Colorado who are or have been holders of an MBNA America MasterCard/Visa Credit Card issued by Defendant, and who have been or might be in the future charged delinquency or late payment charges for monthly installment payments which were not paid when due.

Plaintiff, on behalf of the class, seeks refund of all delinquency or late payment fees charged or collected by the Defendant, all interest charged on such late payment fees, and damages pursuant to C.R.S. §5-5-202(4) and C.R.S. §6-1-113, and for an injunction prohibiting Defendant from continuing to contract for and collect late charges from residents of Colorado in violation of applicable Colorado law.

JURISDICTION

2. Jurisdiction is proper in this Court because the claim arises solely under Colorado statutory and common law. Furthermore, Plaintiff's individual damages do not exceed $15,000, which also includes a reasonable estimate of the value of the injunctive and other relief to him personally as prayed for in this Complaint.

PARTIES

3. Plaintiff Brian K. Copeland currently resides at: 8724 Quarto Avenue, Littleton, Colorado 80123 and has been a Colorado resident since 1986. At various times during the last three years, Defendant has charged Plaintiff's Visa Credit Card account a $15.00 late fee and thereby increased his unpaid balance in the account.

4. Defendant MBNA America (Delaware), N.A. is a national bank association located at Post Office Box 15137, Wilmington, Delaware 19886-5409. MBNA America, with the assistance and under the direction of others currently unknown to Plaintiff, actively solicits Colorado

consumers through direct mailings, "take one" advertisements, and multi-media advertising to apply for and accept credit cards issued by MBNA America within Colorado.

CLASS ACTION ALLEGATIONS

5. Plaintiff brings this case as a class action pursuant to Rule 23 of the Colorado Rules of Civil Procedure on behalf of a class ("the Class") consisting of all the residents of Colorado who are or have been holders of a MasterCard/Visa credit card issued by Defendant MBNA America and have been charged or may be charged illegally a penalty fee in the form of a "past due charge," "delinquency fee," or "late charge" (hereinafter collectively referred to as "Late Charge").

6. On information and belief, there are more than a thousand persons who are or have been holders of the MasterCard/Visa credit card issued by the Defendant while they were residents of Colorado. A substantial number of such persons have been charged a late charge by Defendant. Although the exact number of such persons is unknown to Plaintiff at this time, Defendant's record systems contain information on the identities and location of all such cardholders as well as the amounts of the illegal charges imposed upon or collected from all such persons. Because Defendant has exclusive control of such information, Plaintiff reserves the right to amend his allegations following completion of discovery of Defendant. Given the nature and extent of Defendant's solicitation and activity in Colorado, it is clear that the members

of the Class are so numerous that joinder of all members is impractical.

7. Plaintiff's claims are typical and identical to the claims of the members of the Class since Plaintiff and the other members of the Class sustained damages arising out of the Defendant's wrongful conduct in violation of Colorado law.

8. Plaintiff will fairly and adequately protect the interest of the members of the Class. He has retained counsel competent and experienced in class and consumer litigation, and has no conflict of interest with other Class members in the maintenance of this Class action. Plaintiff's interest is antagonistic to the interest of Defendant and he will vigorously pursue the claims of the Class. Plaintiff has an agreement with the undersigned counsel which provides for counsel to advance all reasonable and necessary costs to litigate this action contingent on the success of the action. Plaintiff is aware that this action may not be settled without Court approval. Plaintiff believes, and therefore alleges, that this action will further the policies and principles underlying the laws of the State of Colorado.

9. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Furthermore, since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation makes it impractical for the class members to individually seek redress for the wrongs done to them. Individual actions would also present a substantial risk of inconsistent decisions, even

though each class member has an identical claim against the Defendant. Plaintiff envisions no difficulty in the management of this action as a Class action. Damages may be calculated with mathematical precision from the information maintained in Defendant's records, thus the cost of administrating any recovery can be minimized.

10. Common questions of law and fact exist as to all members of the Class, and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a. Whether Colorado banking, consumer credit, consumer protection, usury, and common laws have been and continue to be violated by Defendant's acts as alleged herein;

b. Whether Defendant participated in the plan, scheme and course of conduct complained of herein; and

c. Whether the members of the Class sustained damages and, if so, what is the proper measure thereof.

FACTUAL BACKGROUND

11. Sometime in 1988, Plaintiff Copeland was systematically solicited by mail in Colorado by MBNA America to become a Visa cardholder. Thereafter he applied for and received a MBNA America Visa credit card mailed to him at his Colorado residence by Defendant. Plaintiff did not receive his Cardmember Agreement until he received the actual credit card. Neither the application nor the Cardmember Agreement disclosed

that Colorado law prohibits the charging of "late fees" for past due installments or that the law of Plaintiff's resident state, Colorado, was different from the law of Delaware, the state in which Defendant's credit card operation is located. After receiving the credit card, Plaintiff used the credit card to purchase goods and services in Colorado, primarily for personal, family and household purposes and thereby accepted the credit card in Colorado within the meaning of C.R.S. §5-1-201.

12. From time to time, Plaintiff Copeland did not pay his monthly minimum installment due on his account as stated on his monthly billing statements. As a result, his succeeding monthly billing statements, which were mailed to him in Colorado by Defendant, reflected the imposition of a "late charge" of $15. *See, e.g.* Exhibit A attached hereto. These late fee charges were added to the unpaid balance reflected on Plaintiff's monthly billing statements, and interest was then charged on the resulting balance.

13. Plaintiff has since made payments to Defendant to reduce his unpaid balance, which includes paying both the late fee charges and interest calculated thereon. Even though Plaintiff has been making regular monthly payments, Defendant has continued to apply late charges to his account.

14. Defendant issued the MasterCard/Visa card, pursuant to Cardmember Agreements to customers nationwide, including over a thousand residents of Colorado. For at least the past three years, Defendant has issued such cards at an annual percentage rate finance

charge of 19.8%. Pursuant to the Cardmember Agreement, Defendant also imposes a separate $15 late payment charge if the minimum payment due is not paid within 25 days after the payment due date in any one month. According to the Cardmember Agreement, failure to make at least the minimum payment due by the due date in any month puts the customer in default and triggers the late payment charge.

15. Defendant actively solicits card member applications throughout Colorado and nationwide through direct mail, telemarketing, and "take-one" applications. Defendant also conducts extensive multi-media advertising nationwide, which includes advertising in Colorado, newspapers, television, radio, billboards and advertising panels.

16. Defendant does not include late charges in the computation or disclosure of annual percentage rate in the Cardmember Agreement, monthly billing statements, application forms, or national advertising. However, Defendant does separately identify the late payment charges in the card member agreement, and does separately identify finance charges and late payments on the monthly billing statement as "finance charges" and "late charges".

17. A MasterCard/Visa finance charge is imposed on unpaid balances which include unpaid late charges. Multiple late fees are assessed in successive billing cycles for continuing unpaid balances past the 30 day period. A monthly finance charge (which is equal to the annual percentage rate divided by 12) is then imposed on the unpaid balances, including multiple late charges.

18. The late charges collected by Defendant are not components of the finance charges, and are not described as such in the Cardmember Agreement or in the monthly billing statements. The payment of a late charge does not, in itself, influence Defendant's decision as to whether to extend further credit or suspend the credit privileges. The purposes of Defendant's late charges are to deter default and to provide a source of revenue in addition to interest charges. The late charges are not stated in terms of percentages, and are not advertised by Defendant for the purposes of enabling consumers to compare such charges with those of Defendant's competitors. The late charges are penalty charges and are not charges for the extension of credit by Defendant or for the use of money.

19. Defendant sends a thousand or more MasterCard/Visa cardholders their monthly statements to Colorado addresses. It is on these monthly statements that Colorado cardholders, including Plaintiff, have received notice of the assessment of late fee charges. Card member payments to Defendant are then made by a check drawn on the card member's banking account, typically in Colorado. Plaintiff's payments, as with typical payments of other MasterCard/Visa card-holders in Colorado, were drawn on a Colorado bank account.

20. MasterCard/Visa cardholders may use their cards to make a purchase or to obtain cash at the location of participating merchants or at automatic teller machines (ATM) in Colorado.

21. Defendant not only actively solicits Colorado consumers within Colorado to become MasterCard/Visa cardholders, but it also solicits directly and indirectly

through the activities of VISA, MASTERCARD, and other bank card consortia, Colorado merchants and cash clearing systems, such as CIRRUS, to accept and honor the MasterCard/Visa credit cards.

22. On information and belief, out-of-state banks other than Defendant that solicit customers and issue VISA or MASTERCARD credit cards in Colorado disclose on their application forms that late fee charges will not be charged to residents of Colorado and several other states. On information and belief, the fact that late fees may not be charged to Colorado residents by either out-of-state or in-state banks has not resulted in different interest rates being advertised or provided to Colorado consumers by any credit card issuers. Out-of-state banks issuing credit cards to Colorado residents have not been dissuaded or burdened from soliciting such business by the fact that Colorado law prohibits them from charging late fees.

23. To the extent Defendant must institute collection efforts against a past-due account of a cardholder residing in Colorado, Defendant has typically instituted suit and legal proceedings in the courts of Colorado. Defendant has also used and benefited from the judgment execution laws of the State of Colorado.

LEGAL BACKGROUND

24. Colorado law prohibits lender credit card issuers from charging customers any "delinquency fees" in addition to advertised interest rate service charges. C.R.S. §5-3-203(5)(a)(amended bylaws, 1991, H.D. 91-1212 §1, effective July 1, 1991). With respect to credit cards

issued by out-of-state banks and finance agencies, Colorado law makes it clear that it controls and applies to any contract accepted by a Colorado resident while he or she is located in Colorado. C.R.S. §5-1-201. The Colorado Legislature thus has expressed this State's strong and overriding interest in regulating all credit extension practices that reach inside the borders of the state.

25. Although Colorado MBNA America MasterCard/Visa cardholders signed an agreement specifying the law of Delaware shall apply to the agreement, C.R.S. §5-1-201(9)(a) provides that an agreement by a debtor is invalid, with respect to a consumer loan (lender credit cards such as the credit cards issued by MBNA America are considered consumer loans under C.R.S. §5-3-104) [where it provides] that the law of another state shall apply. Therefore, Colorado law, not Delaware law, applies with respect to the credit card agreements.

26. C.R.S. §5-1-201(12)(b) provides that "a lender, whether licensed or not, may not contract for or receive charges exceeding those permitted by this Code for supervised lenders." MBNA America is a supervised lender, C.R.S. §5-3-501(2), as it makes supervised loans as defined by C.R.S. §5-3-501(1), i.e., consumer loans in which the loan finance charge exceeds twelve (12) percent per year.

27. With respect to a supervised loan, lenders may contract for and receive a loan finance charge not exceeding that permitted by C.R.S. §5-3-508(3)(a). Under the Colorado Consumer Credit Code, such banks' finance agencies and retailers may charge an interest rate on

outstanding credit card balances not to exceed twenty one percent (21%) per year.

28. A separate section of the Colorado Consumer Credit Code §5-3-203, prohibits such banks and finance agencies from charging any late fees or delinquent fees on credit cards accounts:

> (5)(a) Except as provided in paragraph (b) of this subsection (5), with respect to a consumer loan, refinancing, or consolidation which is not precomputed, including a revolving loan account, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the installment or ten dollars; except that the provisions of this paragraph (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.

(Emphasis supplied). Thus banks, finance agencies, and retailers operating within Colorado may charge a maximum annual percentage interest rate on the unpaid balances of 21%, but may not charge any late fee or delinquency fee when the cardholder is late or even misses a monthly payment. Of course, interest continues to accrue on such unpaid balances.

29. Although Colorado law clearly limits the *interest rates* that Colorado banks and finance agencies may charge their customers, it does not limit the *interest rates* out-of-state banks may charge even where the consumers are residents of Colorado. This is because federal law specifically addresses "interest rates" charged by national

or state chartered banks. Under the National Bank Act, 12 U.S.C. §85, out-of-state banks are permitted to charge their customers any interest rate that is permitted by the law of the state in which the bank is located. Taking advantage of this law to attract the business of credit card issuers in the early 1980's, several states – most notably Delaware and South Dakota – have virtually eliminated interest rate and other usuary [sic] restrictions, encouraging banks (such as MBNA America) to locate there.

30. Although federal law permits out-of-state banks such as Defendant to export to Colorado and other states interest rates permitted in their state of location, it does not permit them to export late fees or any other charges, fees or terms to a borrower state. Yet, as evidenced by this case, state and national banks located in deregulated states, including Defendant herein, have knowingly and repeatedly misused and misconstrued federal authority as a pretext and vehicle to evade state laws [prohibiting] non-interest rate charges such as late fees or other substantive requirements which are specifically addressed by Colorado law.

31. In contrast with states like Delaware and South Dakota, Colorado has sought to preserve its consumer protection and usuary [sic] laws. Colorado has not forsaken such protection simply to lure certain businesses to set up operations within the state. Defendant's conscious disregard of Colorado laws has undermined the carefully crafted regulatory scheme of Colorado, and has perverted the balance between the federal interest and permitting a national market for consumer interest rates and the state interest in protecting consumers against late fees, hidden charges and overreaching credit collection practices.

32. By knowingly contracting for and charging Plaintiff and members of Class late fees or delinquency charges that are clearly prohibited by Colorado law, Defendant has willfully violated the law.

FIRST CLAIM FOR RELIEF

Pursuant to C.R.S. §5-5-202

33. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 32 as if fully set forth herein.

34. Defendant has willfully failed to comply with the provisions of the Colorado Consumer Credit Code (the "Code") as it has knowingly contracted for, charged and collected from Plaintiff, and the members of the Class, late fees and expenses prohibited under C.R.S. §5-3-203.

35. Pursuant to C.R.S. §5-5-202 Plaintiff and members of the Class are entitled to reimbursement of all late fees contracted for, charged and collected by Defendant. Furthermore, if the creditor, MBNA America, has made an excess charge in deliberate violation of or in reckless disregard of this Code, a penalty may be recovered even though the creditor has refunded the excess charge. The penalty a person may recover is the amount determined by a court which shall not exceed the greater of either the amount of the credit service charge, or ten times the amount of the excess charge. C.R.S. §5-5-202(4).

36. Accordingly, Defendant is liable to Plaintiff and the members of the Class for substantial actual damages,

the precise amount which shall be determined after discovery of Defendant. Moreover, given the blatant and persistent nature of Defendant's misconduct, Plaintiff and other members of the Class should be awarded ten times the amount of the excess charge.

37. WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for judgment as follows:

a. Declaring this action to be a proper class action pursuant to Rule 23 of the Colorado Rules of Civil Procedure and that Plaintiff is a proper class representative of the Class;

b. Awarding Plaintiff and the other members of the Class compensatory damages as a result of the wrongs alleged in the First Claim for Relief;

c. Awarding Plaintiff and the other members of the Class ten times the amount of the "late fee" charges given Defendant's persistent and blatant disregard of Colorado law.

e. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest as a result of the wrongs complained of herein;

f. Awarding Plaintiff and the other members of the Class their costs and expenses in this litigation, including reasonable attorneys' fees and expert fees and other costs and disbursements; and

g. Awarding Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

SECOND CLAIM FOR RELIEF

Pursuant to C.R.S. §5-3-203(5)(a)

38. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 37 as if fully set forth herein.

39. Pursuant to C.R.S. §5-3-203(5)(a), Defendant is prohibited from soliciting, contracting for, billing and continuing to collect from Colorado consumers, including Plaintiff and members of the Class, any late fees or delinquency charges on past installments. Upon information and belief, Defendant is continuing, and intends to continue to solicit, contract for, bill and collect late fees or delinquency charges.

40. Continuation by Defendant of its illegal practices will irreparably harm Plaintiff and members of the Class, as it will directly result in negative information being reported by Defendant to credit bureaus and credit reporting agencies. The reporting of such negative and legally incorrect information will constitute credit libel and will prevent Plaintiff and other members of the Class from obtaining credit from other sources or from obtaining credit on terms as favorable as those available to persons whose credit reports lacks the negative information communicated by Defendant.

41. Plaintiff and other members of the Class are without an adequate remedy at law because it will be difficult, if not impossible, to prove the level of impact attributable to Defendant's transmission of negative credit information to credit reporting agencies or the

decisions of other financial agencies to extend credit to Plaintiff and other members of the Class.

42. Accordingly, Defendant should be preliminarily and permanently enjoined and prohibited from continuing its illegal practices. Moreover, Defendant should be enjoined from communicating negative payment information about the accounts of Plaintiff and the members of the Class to any credit bureau or to any credit reporting agency to the extent that such information is, in whole or in part, related to the non-payment of an illegally charged late payment fee.

43. WHEREFORE, plaintiff, on behalf of himself and the Class, prays for judgment as follows:

a. Declaring this action to be a proper class action pursuant to Rule 23 of the Colorado Rules of Civil Procedure and that Plaintiff is a proper class representative of the Class;

b. Preliminarily and permanently enjoining Defendant from continuing their illegal practices and from communicating adverse information related to Late Fees or Penalty charges to any credit bureaus or credit reporting agencies reflecting reports about Plaintiff or any member of the Class as prayed for in the Second Claim for Relief;

c. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest as a result of the wrongs complained of herein;

d. Awarding Plaintiff and the other members of the Class their costs and expenses in this litigation, including reasonable attorneys'

fees and expert fees and other costs and disbursements; and

e. Awarding Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

THIRD CLAIM FOR RELIEF

Unjust Enrichment

44. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 43 as if fully set forth herein.

45. By reason of the misconduct alleged above, Defendant has been unjustly enriched at the expense of Plaintiff and members of the Class.

46. The late fee charges imposed by Defendant were not and are not reasonably related to any administrative costs to Defendant that are not already inherent in the establishment, investigation and maintenance of the credit extended to consumers and thus, are already accounted for in the interest rate charged under Defendant's 19.8% annual percentage rate finance charge.

47. Accordingly, Defendant is liable to the Plaintiff and the members of the Class in the amount of the unjust enrichment to Defendant from imposition and collection of such late fees, plus interest on such amount.

48. WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for judgment as follows:

a. Declaring this action to be a proper class action pursuant to Rule 23 of the Colorado

Rules of Civil Procedure and that Plaintiff is a proper class representative of the Class;

b. Awarding Plaintiff and the other members of the Class compensatory damages as a result of the wrongs alleged in the Third Claim for Relief;

c. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest as a result of the wrongs complained of herein;

d. Awarding Plaintiff and the other members of the Class their costs and expenses in this litigation, including reasonable attorneys' fees and expert fees and other costs and disbursements; and

e. Awarding Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

FOURTH CLAIM FOR RELIEF

Violation of the Colorado Consumer Protection Code Pursuant to C.R.S. §6-1-105

49. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 48 as if fully set forth herein.

50. By engaging in misconduct alleged above, Defendant has employed unfair methods of competition and unfair or deceptive acts or practices in the conduct of the trade or commerce of credit extension. In particular, Defendant's acts and practices constitute fraudulent conduct which creates, was designed to create, and will

continue to create a likelihood of confusion or misunderstanding about the propriety of late charges imposed on members of the Class, including the liability or not of such members to pay late fees not permitted by Colorado law, but nonetheless charged the members credit card accounts. C.R.S. §6-1-105(2).

51. As a direct and proximate result of Defendant's employment or use of these unfair methods of competition unfair or deceptive acts or practices, Plaintiff and the other members of the Class have sustained ascertainable damages in as much as they have paid late fees to Defendant together with interest calculated on the late fees that were added to unpaid balances of the accounts of Plaintiff and other members of the Class.

52. Pursuant to C.R.S. §6-1-113, Plaintiff and other members of the Class are entitled to recover the excess amount they paid or if the creditor has engaged in any deceptive trade practice in deliberate violation of Colorado law, three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater. The precise amount of such damages in the aggregate will be determined after discovery of Defendant.

53. WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for judgment as follows:

a. Declaring this action to be a proper class action pursuant to Rule 23 of the Colorado Rules of Civil Procedure and that Plaintiff is a proper class representative of the Class;

b. Awarding Plaintiff and the other members of the Class treble damages, or a minimum of $250 per person as the case may be, as a

result of the wrongs alleged in the Fourth Claim for Relief;

c. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest as a result of the wrongs complained of herein;

d. Awarding Plaintiff and the other members of the Class their costs and expenses in this litigation, including reasonable attorneys' fees and expert fees and other costs and disbursements; and

e. Awarding Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury of all issues so triable.

Dated at Denver, Colorado this 5th day of June, 1992.

Respectfully submitted,

BADER & VILLANUEVA, P.C.

/s/ Gerald L. Bader, Jr.
Gerald L. Bader, Jr., #3625
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ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:

Brian K. Copeland
8724 West Quarto Avenue
Littleton, Colorado 80123-4269

ACKNOWLEDGEMENT OF VERIFICATION BY ATTORNEY

STATE OF COLORADO :
CITY AND : ss.
COUNTY OF DENVER :

On this, the 5 day of June, 1992, before me Gerald L. Bader, Jr., the undersigned officer, personally appeared, (known to me or satisfactory proven) to be a member of the Bar of the Supreme Court of said state and a subscribing witness to the within verification and certified that he was personally present when Plaintiff Brian K. Copeland, whose name is subscribed to the within Verification, executed the same, and that said person acknowledged that he executed the same for the purposes conferred and contained.

In witness whereof, I hereto set my hand and official seal.

/s/ Marlynn K. Newcomb

(SEAL)
My commission expires: July 28, 1995

VERIFICATION

I, Brian K. Copeland, hereby states:

1. I am the Plaintiff in this action;

2. I verify that the statements made in the foregoing Class Action Complaint are true and correct to the best of my knowledge, information and belief.

Plaintiff: /s/ Brian K. Copeland
Brian K. Copeland

[Exhibit Omitted In Printing]

SUPREME COURT OF NEW JERSEY
A-102 September Term 1994

MARC SHERMAN, on behalf of
himself and all others
similarly situated,

Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Defendant-Respondent.

Argued February 15, 1995 – Decided November 28, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 272 *N.J. Super.* 435 (1994).

Michael D. Donovan, a member of the Pennsylvania bar, argued the cause for appellant (*Spector Gadon & Rosen*, attorneys; *Mr. Donovan* and *Ann Miller*, a member of the Pennsylvania bar, of counsel; *Mr. Donovan, Ms. Miller, Paul R. Rosen*, and *Robert L. Grundlock, Jr.*, on the briefs).

Louis R. Cohen, a member of the District of Columbia bar, argued the cause for respondent (*Dechert Price & Rhoads*, attorneys; *Mr. Cohen, George G. O'Brien, Matthew V. DelDuca*, and *Robert D. Rhoad*, on the briefs).

Marilyn A. Bair, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*James J. Ciancia*, Acting Attorney General, attorney; *Andrea M. Silkowitz*, Assistant Attorney General, of counsel).

Richard P. Jacobson submitted a brief on behalf of *amici curiae* The States of Arizona, Delaware, Louisiana, Nevada, Ohio, South Dakota, and Utah (*Dunn, Pashman, Sponzilli, Swick & Finnerty,* attorneys).

Irene E. Dowdy, Assistant United States Attorney, submitted a brief on behalf of *amicus curiae* Office of the Comptroller of the Currency (*Faith S. Hochberg,* United States Attorney, attorney).

Charles N. Riley submitted a brief on behalf of *amicus curiae* Consumer Action (*Tomar, Simonoff, Adourian & O'Brien,* attorneys).

Charles N. Riley submitted a brief on behalf of *amici curiae* the States of Hawaii, Iowa, Maryland, Massachusetts, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin (*Tomar, Simonoff, Adourian & O'Brien,* attorneys).

Mark L. First submitted a brief on behalf of *amicus curiae* Mellon Bank (DE), N.A. (*Reed, Smith, Shaw & McClay,* attorneys).

Dennis R. Casale submitted a brief on behalf of *amici curiae* The New Jersey Bankers Association, American Bankers Association, American Financial Services Association and Consumer Bankers Association (*Jamieson, Moore, Peskin & Spicer,* attorneys).

Jeffrey M. Keiser submitted a brief on behalf of *amici curiae* Trial Lawyers for Public Justice, P.C., and Bankcard Holders of America, Inc.

Michael J. Dunne submitted a brief on behalf of *amici curiae* Visa U.S.A., Inc., and Mastercard International Incorporated (*Pitney, Hardin, Kipp & Szuch,* attorneys).

The opinion of the Court was delivered by HANDLER, J.

In this case, as in the companion case of *Hunter v. Greenwood Trust Co.*, ___ *N.J.* ___, *rev'g* 272 *N.J. Super.* 526 (1994), also decided today, New Jersey credit-card customers contend that New Jersey's usury laws prohibit banks that issue those cards from charging late-payment fees to New Jersey customers.

The issues before us are more specifically framed by the claims and defenses of the respective parties. Plaintiff, as a named party in a class-action suit, challenges the legality of the late-payment fees that are charged to New Jersey holders of defendant Citibank (South Dakota) credit cards. Plaintiff argues that New Jersey's Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-50, -54 (RISA), forbids national banks that issue credit-cards to New Jersey consumers from charging late-payment fees. Plaintiff also argues that defendant's failure to disclose in its cardmember agreements and advertising that late-payment fees are prohibited by New Jersey law violates New Jersey's Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-2, -19. Finally, plaintiff contends that the imposition of late-payment fees constitutes a common-law breach of contract and conversion.

Defendant relies on section 85 of the National Bank Act (NBA), which provides that a national bank may charge borrowers "interest at a rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 85. Citibank is a national bank chartered in South Dakota, and South Dakota includes late-payment fees in its statutory definition of interest. 272 *N.J. Super.* at 438.

Citibank, therefore, contends that plaintiff's RISA claim, as well as plaintiff's other claims, conflict with, and are preempted by, section 85. *See id.* at 439. Thus, Citibank argues it is free to charge late-payment fees in New Jersey.

Following the commencement of this action, the Law Division granted the bank's motion to dismiss the complaint with prejudice. The Appellate Division affirmed. 272 *N.J. Super.* 435 (1994). We granted plaintiff's petition for certification, 138 *N.J.* 270 (1994), and now reverse the dismissal of plaintiff's claims.

We determine that the understanding of "interest" as expressed and authorized in the NBA does not include distinctive and contingent loan terms or charges, such as late fees, that are unrelated to interest rates. We hold that late-payment fees are not "interest" within the intendment and purposes of the applicable federal statute. Rather, "interest at a rate allowed by the laws of the State . . . where the bank is located" refers only to the periodic percentage rate charged on outstanding balances. Therefore, plaintiff's state-law defenses to the bank's charges do not conflict with federal law, are not preempted, and the late-payment fees are illegal under New Jersey law.

I

Since the early years of the Republic, the states have generally resisted the development of national banks and favored their own state-chartered banks through regulatory legislation. William Oscar Scroggs, *A Century of Banking Progress* 50-51 (1924); John J. Knox, *A History of*

Banking in the U.S. 12 (2d ed. 1969). The Supreme Court has, since *M'Culloch v. Maryland*, 17 *U.S.* (4 Wheat) 316, 4 *L. Ed.* 579 (1819), generally limited federal statutory involvement by construing preemption narrowly and giving relatively free rein to state usury law regulations. *See Anderson Nat'l Bank v. Luckett*, 321 *U.S.* 233, 64 *S. Ct.* 599, 88 *L. Ed.* 692 (1944); *McClellan v. Chipman*, 164 *U.S.* 347, 17 *S. Ct.* 85, 41 *L. Ed.* 461 (1896).

This Court, in considering preemption claims, must be cautioned by the longstanding presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 *U.S.* 725, 746, 101 *S.Ct.* 2114, 2129, 68 *L. Ed.* 2d 576, 595 (1981), and that it should not unnecessarily disturb "the federal-state balance." *United States v. Bass*, 404 *U.S.* 336, 349, 92 *S. Ct.* 515, 523, 30 *L. Ed.* 2d 488, 497 (1971). Indeed, greater restraint ought apply to preemption of spheres traditionally occupied by the states. Where the field that Congress is said to have preempted has been traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless there was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 *U.S.* 218, 230, 67 *S.Ct.* 1146, 1152, 91 *L. Ed.* 1447 (1947).

"It is well settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain 'traditionally occupied' by the states." *Greenwood Trust Co. v. Massachusetts*, 776 *F. Supp.* 21, 27-28 (D. Mass. 1991), *rev'd*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, ___ U.S. ___, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993) (citing *Lewis v. BT Inv. Managers, Inc.*, 447 *U.S.* 27, 38, 100 *S.Ct.* 2009, 2016, 64 *L.*

Ed. 2d 702, 713 (1980) ("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern")); *Smiley v. Citibank (South Dakota), N.A.*, 44 *Cal. Rptr.* 2d 441, 465-66 (1995) (Arabian, J., dissenting) (same); *id.* at 467-68 (George, J., dissenting) (same). Accordingly, "[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area." *General Motors Corp. v. Abrams*, 897 *F.*2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission consent decree preempted major elements of the local law). Congress' failure to include an express preemption clause in section 85 necessitates a careful examination of whether the NBA conflicts with RISA's prohibition of late-payment fees.

Section 85 provides in pertinent part:

> Any [national bank] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at a rate allowed by the laws of the State, Territory or District where the bank is located*, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . .
>
> [12 *U.S.C.A.* § 85 (emphasis added).]

On its face, section 85 immunizes national banks that lend money beyond their home-state's borders from local

usury laws that might give local banks a competitive advantage. It also protects national banks during periods of inflation by overriding even the home-state's usury laws and permitting national banks to charge interest at a rate tied to the federal discount rate. *E.g., Tiffany v. National Bank*, 85 *U.S.* (18 Wall) 409, 412-13, 21 *L. Ed.* 862, 863-64 (1874) (holding that Congress, by enacting NBA, intended to protect national banks from hostile state usury laws); *Roper v. Consurve, Inc.*, 578 *F.* 2d 1106 (5th Cir. 1978), *aff'd sub nom., Deposit Guaranty Nat'l Bank v. Roper*, 445 *U.S.* 326, 100 *S. Ct.* 1166, 63 *L. Ed.* 2d 427 (1980) (holding section 85 was designed by Congress to mandate parity between national banks and local lenders). However, neither the plain meaning of the terms "rate" and "interest" in section 85, nor the legislative history of that provision indicates that these terms carry the expansive meaning inferred by defendant. *See Smiley, supra*, 44 *Cal. Rptr.* 2d at 469 (George, J., dissenting).

Since 1874, the Supreme Court has interpreted section 85 as entitling a national bank to charge the highest interest rate allowed to lenders by the laws of the state in which the bank is located. *Tiffany, supra*, 85 *U.S.* at 411-13, 21 *L. Ed.* at 863-64 ("The only mode of guarding against [state discrimination] was . . . to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate"). Courts have recognized that *Tiffany* construed section 85 to place national banks in a position of limited advantage over state banks by allowing them to charge interest at the highest rate applicable under state law to lenders generally and not necessarily at a rate applicable to state banks, which might be lower. This ability to "borrow" an interest rate has come

to be known as the "most-favored-lender" doctrine. *See, e.g., Fisher v. First Nat'l Bank*, 548 F.2d 255 (8th Cir. 1977) (recognizing that notwithstanding limitations on interest imposed on state banks by Nebraska law, national bank located in Nebraska could legally charge, with respect to credit-card transactions, rates allowed by Nebraska law to small loan companies).

In *Marquette National Bank v. First of Omaha Service Corp.*, 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978), the Supreme Court relied on the NBA and its most-favored-lender doctrine to allow a national bank chartered in Nebraska to charge its credit-card customers in Minnesota a rate of interest authorized in Nebraska, but prohibited by usury law restrictions in Minnesota. *Id.* at 313-15, 99 *S.Ct.* at 548-49, 58 *L. Ed.* 2d at 545-46. The *Marquette* Court recognized that the "exportation" of interest rates from a national bank's "home state" into a foreign state would "significantly impair the ability of the States to enact effective usury laws," but it found that such impairment "has always been implicit in the structure of the National Bank Act since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." *Id.* at 318, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548 (citation omitted) (footnote omitted).

The Court, nonetheless, suggested Congressional action would be necessary to check the preemptive effect of the NBA in a time of national bank deregulation, tightened credit availability, and an increasingly nationalized credit-card lending system:

> This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards.

> But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.
>
> [*Id.* at 318-19, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548.]

Marquette does not mandate or encourage an extension of the "most-favored-lender" status to expand the definition of "rates" to include other non-interest rate charges. The national bank's authorized exportation of lending terms in *Marquette* was limited to numerical percentage-rate interest terms. The Court made no mention of the exportation of other credit-card terms, such as late charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit-card loans could be imposed on customers in other states. *See Smiley, supra,* 44 *Cal. Rptr.* 2d at 465 (Arabian, J., dissenting).

In the years following *Marquette,* Congress embarked on a mission to deregulate the banking industry. Interest rates soared, and while national banks could charge interest at a rate tied to the federal discount rate, state banks were constrained by local usury laws. *See Greenwood Trust, supra,* 971 *F.*2d at 826. Congress sought to rectify that obvious inequity by enacting the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 *U.S.C.A.* § 1831d (DIDA). *Ibid.* The language of section 521 of DIDA essentially mirrors that of section 85 of the NBA. Courts and federal agencies have interpreted section 521 as conferring on federally-insured state banks the same insulation from state usury laws that national

banks have enjoyed under the NBA. *Id.* at 826-27 (concluding that Section 521 permits federally-insured state banks to "export" interest rates); *Vanderweyst v. First State Bank,* 425 *N.W.*2d 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most favored lender" status), *cert. denied,* 488 *U.S.* 943, 109 *S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988).

The legislative history of DIDA is instructive to our understanding of Congress' general understanding of interest and its intent with respect to the notion of interest contained in the NBA. *E.g. Copeland v. MBNA America Bank, N.A.,* ___ *Colo.* ___ (1995) (slip op. at 14). Although the NBA was enacted 100 years earlier, the same tensions, namely parity between federal and state lenders and preservation of local usury laws, were present and these conflicting considerations generated substantial concerns surrounding the passage of the earlier banking statute.

The record of Congressional debate and deliberation concerning the enactment of DIDA strongly supports the understanding that preemption of credit-card regulation under DIDA is confined to traditional numerical interest rates. The central unifying purpose of DIDA was to provide for increased access to home mortgage loans. Section 501 of DIDA provided for preemption of state usury limits on mortgage loans in a manner virtually identical to the treatment of other loans (including credit-card agreements) in Title V of the Act, which contains section 521.

The Senate Report of deliberations over section 501 of DIDA restricts preemption and expressly reserves the regulation of "late charges" to the states.

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.
>
> [S. Rep. No. 96-368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 *U.S. Code Cong. and Ad. News*, Vol. 2, 236, 255.]

Subsequent legislative history links preemption concerns in section 501 both to the consideration of section 521, and to DIDA in its entirety as passed on March 27-28, 1980. Notably, Congress passed section 501 at the same time, and the same title (Title V) of the same act, as section 521.

During the discussion on the Senate floor of the various bills that figured in the development of DIDA, Senators Pryor and Bumpers proposed an amendment, S. 1988, to give state-chartered institutions "competitive equality" with national banks by allowing them to charge interest at one percent above the federal discount rate. 125 *Cong. Rec.* 30655 (1979). Senator Proxmire, floor manager of the Senate bills under discussion, and chairman of the Senate Banking Committee, understood the proposed amendment to override state usury laws and emphasized that there was "a sharp division and difference of opinion in the Senate." *Id.*

Separate hearings on the Pryor-Bumpers initiative, S. 1988, 96th Cong. 1st Sess, (1979) were held December 17, 1979, and though it was not reported out of committee, the bill's language was substantially incorporated into

House Bill 4986, H.R. 4986, 96th Cong., 1st Sess. (1979), which was, in turn, enacted as DIDA. William M. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 *Bus. Law.* 1079, 1096-97 and n.102 (1982).

A fair reading of the legislative history indicates that Congressional concern was focused with particularity on numerical or percentage interest rates. In introducing S. 1988, Senator Pryor noted, "A national bank may charge one percent above the Federal discount rate, notwithstanding any State laws setting an interest-rate ceiling . . . [which] obviously discriminates in the strongest possible way against State banks." 125 *Cong. Rec.* 30655 (1979). The great bulk of the subsequent committee testimony and discussion indicates that the proposed preemption amendment was limited because, in Senator Pryor's words, it "would merely allow State chartered, federally insured banks . . . to charge the same interest rate as national banks." *Id.* In fact, there were only two references to wider displacement of state law though expansion of the "most-favored-lender doctrine." Senator Bumpers, co-sponsor of the preemption amendment, confined his remarks to numerical interest rate disparities and remarked pointedly, "I do not think it is particularly healthy to be overriding state law." *Id.*

Post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late fees by credit-card issuers. In 1981 and in 1983-84 the Senate (but not the House) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late charges from preemption. *Greenwood Trust, supra*, 776 *F. Supp.* at 31 (citing *Hearings on S. 730 Before the*

Senate Committee on Banking, Housing and Urban Affairs, 98th Cong., 1st Sess. (April 12, 1983); Hearings on S. 1720, 1981.[1] The failed S. 730 bill also expressly granted states the right to override preemption.

Thus, the fact that Congress was specifically concerned about effecting a preemption limited to numerical interest rates is significant. If we cannot attribute to legislative initiative of 15 years ago the intent to include

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[1] S. 730, the "Credit Deregulation and Availability Act of 1983," would have amended Title V of DIDA to provide, in relevant part, as follows:

> Sec. 531. The provisions of the constitution or laws of any State prohibiting, restricting, or in any way limiting the rate, nature, type, amount of, or the manner of calculating or providing or contracting for covered charges that may be charged, taken, received or reserved shall not apply to any extension of consumer credit made by the creditor.
>
> Sec. 532. (a) As used in this part –
>
> (1) The term "covered charges" means –
>
> (A) interest, discount, points, a time price differential, or any similar fees, charges, or other compensation paid to the creditor and arising out of the credit agreement or transaction for the use of credit or credit services. *The term shall not include, however, fees, charges or other amounts paid to the creditor or arising out of the credit agreement or transaction that are paid or arise solely as the result of the failure or refusal of the debtor to comply with the terms and conditions of the debtor's agreement with the creditor, including without limitation the fact that the obligation is not repaid in accordance with the payment schedule.* . . .
>
> [129 *Cong. Rec.* S. 17045-17046 (November 18, 1983) (emphasis added).]

discrete, specialized charges within a definition of interest, we cannot ascribe that expansive definition to a legislative initiative that occurred over 100 years earlier. That is especially so when the later statute substantially paralleled the language of the former, and it was passed in an effort to give federally-insured state banks status equal to national banks that had enjoyed a superior status since the enactment of the earlier act. Thus, it would be contrary to common sense to conclude that in enacting the NBA, Congress contemplated an open-ended and expansive concept of interest that was light years from the traditional understanding of a fixed, basic percentage rate applied to an unpaid loan balance. Or that, correlatively, it intended to prohibit states from regulating specific terms and conditions of loans and preventing lenders from charging late-payment fees.

II

Defendant relies on case law from other jurisdictions to support its expansive interpretation of "interest", specifically, *Greenwood Trust, supra,* 971 F.2d 818 and *Tikkanen v. Citibank (South Dakota), N.A.,* 801 *F. Supp.* 270 (D. Minn. 1992). We find, however, that the reasoning expressed in the *Greenwood Trust* line of cases and the authorities cited by the *Greenwood Trust* court are unpersuasive and do not support the conclusion that Congress intended to include non-interest rate charges in its understanding of interest.

Greenwood Trust held that prior case law supported the notion that federal common law construes interest to encompass a variety of lender-imposed fees and financial

requirements that are independent of a numerical percentage rate. 971 F.2d at 829 (citing *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787-88 (9th Cir. 1982); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-61 (8th Cir. 1977); *Panos v. Smith*, 116 F.2d 445, 446-46 (6th Cir. 1940); *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir.), *cert. denied*, 290 U.S. 685, 54 S. Ct. 121, 78 L. Ed. 590 (1933); *Nelson v. Citibank (South Dakota) N.A.*, 794 F. Supp. 312, 318 (D. Minn. 1992)). Inimical to the holding in *Greenwood Trust*, a careful examination of the cases cited does not establish that Congress intended to include late-payment fees within a federal definition of interest under either section 85 or section 521.

Contrary to the *Greenwood Trust* court's interpretation, *American Timber & Trading Co., supra*, did not hold that a compensating-balance requirement was interest under section 85. Rather, the court held that a compensating-balance requirement reduces the principal amount of a loan for purposes of calculating effective interest. 690 F.2d at 787-88. In addition, *Fisher, supra*, did not expressly hold that cash-advance fees were interest under section 85. In that case, the plaintiff challenged the periodic interest and cash-advance fees charged by an out-of-state national bank. 548 F.2d at 256. The court applied the most favorable laws covering any class of lenders in the bank's home state, which permitted certain lenders to charge 30% interest on a balance under $300, and held that the charges were not usurious. *Id.* at 258-61. The court did not even discuss the distinction between periodic interest rates and the flat fees charged.

In *Panos, supra*, the court did not hold that mortgage taxes and recording fees were interest under section 85.

Rather, the court held that such charges, which were deducted from the principal received by the borrower, reduced the principal amount of a loan for purposes of calculating effective interest. 116 *F.*2d at 446-47.

In *Cronkleton, supra,* the court did not conclude that a bonus or commission was interest under section 85. The Eighth Circuit's holding (in relevant part) was limited to a modification of the district court's award of damages for usury under the NBA. The court's opinion does not provide a detailed account of the facts. However, it appears that in February 1926, the defendant, a national bank, loaned $55,000 to the plaintiffs. 66 *F.*2d at 385. The contractual periodic rate of interest was not usurious. *Ibid.* But, in November 1930, plaintiffs paid to the bank an additional $1,000. *Ibid.* Although the district court "made no findings as to bonuses paid," the court characterized the additional payment as a bonus or commission. *Id.* at 386. The court then noted that "in determining the rate 'reserved' or 'charged' . . . the taking of a 'bonus' or 'commission' . . . may enter in to render an otherwise lawful rate unlawful and usurious." *Id.* at 387.

The *Greenwood Trust* court suggested that *Nelson, supra,* decided three months earlier, held that late-payment fees were interest under section 85. 971 *F.*2d at 829. However, *Nelson* expressly disclaimed that conclusion. 794 *F. Supp.* at 320 ("the question of whether national banks may export terms other than periodic interest charges goes to the merits of the case; deciding that question on a motion to remand is inappropriate"). The court held only that the defendant's claim that section 85 preempted plaintiffs' state law claims raised a substantial federal question. *Id.* at 315-16.

The court in *Greenwood Trust* also cited several cases to support the proposition that section 85 "adopts the entire case law of [a state bank's home] state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state." 971 F.2d at 829 (citing *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975); *accord Roper v. Consurve, Inc.*, 777 F. Supp. 508, 510-11 (S.D. Miss. 1990), *aff'd*, 932 F.2d 965 (5th Cir.) (table), *cert. denied*, ___ U.S. ___, 112 S. Ct. 181, 116 L. Ed. 2d 142 (1991); *Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549, 555, 20 S. Ct. 732, 735, 44 L. Ed. 882 (1900); *Union Nat'l Bank v. Louisville, N.A. & C. Ry.*, 163 U.S. 325, 331, 16 S. Ct. 1039, 1042, 41 L. Ed. 177 (1896); *Bartholomew v. Northampton Nat'l Bank*, 584 F.2d 1288, 1295 (3d Cir. 1978); *McAdoo v. Union Nat'l Bank*, 535 F.2d 1050, 1055-58 (8th Cir. 1976); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 861-64 (6th Cir. 1972)). Those cases, however, do not demonstrate that Congress intended to incorporate a state definition of interest that would authorize states unilaterally to incorporate non-percentage rate charges into an exportable definition under section 85. Moreover, none of those cases involve a definition of interest for exportation purposes where the definition varied between states.

Nowlin, supra, exemplifies the *Greenwood Trust* court's misplaced reliance on previous cases construing the NBA. In *Nowlin*, a national bank in Arkansas loaned money to the plaintiff, who agreed to repay the loan in installments. 509 F.2d at 874. Instead of amortizing the loan over the agreed term, the bank "discounted" the notes by 8%; that is, the bank gave the plaintiff the requested sum, but an additional 8% for every year of the notes' term

was immediately added to the outstanding principal amount. *Ibid.* The plaintiff then had to repay the adjusted principal amount in equal payments over the term. *Ibid.* Because all interest was calculated up-front based on the initial loan amount, instead of being calculated periodically on a declining principal balance, the national bank achieved an effective yield of nearly 16%. *Ibid.*

The bank did not dispute that Arkansas considered usurious interest rates over 10%. *Id.* at 876. Furthermore, the bank did not dispute that a state bank could not "discount" notes in a like manner because Arkansas case law defined interest for purposes of its usury laws as "effective yield." *Ibid.* However, the bank argued that because it was a national bank, it was subject only to section 85, which defined interest narrowly to include only percentage rates charged, not effective yields. *Ibid.* Because its 8% discount rate was less than the 10% Arkansas-usury rate, the bank argued that it did not violate the NBA. *Ibid.*

The court rejected the bank's arguments. After discussing the objectives of section 85, the court held that such a narrow interpretation would be inconsistent with Congress' desire to foster competitive equality between state and national banks. *Id.* at 880. Thus, the court held, Arkansas' definition of interest was incorporated into section 85. *Ibid.*

Contrary to the *Greenwood Trust* Court's conclusion, *Nowlin* does not offer an expanded definition of the term "rate," but rather shows only that calculation of chargeable interest rates must take "the case law of the state" into account. The state law regarding discounting was

given substantial weight because discounting, unlike late-fee charges, directly affects the numerical interest rate by altering the percentage rate over time. It is noteworthy that the *Nowlin* decision involved the intra-state, not inter-state, application of Arkansas' definition of interest. Thus, it said nothing about exporting that definition to a foreign state where state-usury laws are more restrictive. Moreover, the case should be read as a judicial attempt to protect state usury laws at the expense of the federal most-favored-lender doctrine.

Defendant also refers, as does the dissent, to *Smiley v. Citibank, supra,* 44 *Cal. Rptr.*2d 441 (1995), to support its position that "interest" under section 85 includes late charges. *Post* at ___ (slip op. at 4). Similar use is made of *Copeland v. MBNA America Bank, N.A., supra,* ___ *Colo.* ___ (1995). The majority in *Smiley* bases that conclusion in large measure on its understanding of historical legal usage. *Smiley, supra,* at 449-51. *See also Copeland, supra,* at ___ (slip op. at 11-13) (same). In our view, however, interest in its historical setting is limited to a periodic charge expressed as a percentage of a principal balance due. See discussion, *supra,* at 25-28. The majority in *Smiley* also concluded that if interest does not include late charges then a state could discriminate against a national bank to make it unprofitable for it to lend money in that state. *Smiley, supra,* at 451. However, a state cannot discriminate against a national bank by permitting state banks to charge late fees or higher late fees while prohibiting a national bank from charging those fees. See discussion, *infra* at 38-41. *See Smiley, supra,* at 470 (George, J., dissenting) (noting that it has been established since the early 1800's that even in the absence of a specific federal

statutory prohibition a state may not discriminate against a federal instrumentality either in the enactment or enforcement of state laws). Thus, the most-favored-lender doctrine serves to eliminate discrimination without distorting or extending the meaning of interest to include charges that Congress neither expressly nor implicitly incorporated in the definition of interest.

III

Defendant, as well as the dissent, cites a recently promulgated proposed interpretive ruling by the Office of the Comptroller of the Currency (OCC), the agency charged with enforcement of the NBA, as evidence that late fees constitute interest for purposes of the NBA. *Post* at ___ (slip op. at 16). The soundness of this ruling, and its value as authority, are greatly undermined when placed in the context of conflicting OCC rulings.

It is well settled that in general an agency's interpretation of a statute it is charged with enforcing is entitled to substantial deference, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 *U.S.* 837, 843-45, 104 *S. Ct.* 2778, 2781-83, 81 *L. Ed.* 2d 694, 703-04 (1984); *EPA v. National Crushed Stone Ass'n*, 449 *U.S.* 64, 83, 101 *S. Ct.* 295, 307, 66 *L. Ed.* 2d 268, 283 (1980) (citing *Udall v. Tallman*, 380 *U.S.* 1, 16, 85 *S. Ct.* 792, 801, 13 *L. Ed.* 2d 616 (1965)), and must in general be upheld even if that interpretation is not the only permissible one or even the most reasonable. *Grocery Town Market, Inc. v. United States*, 848 *F.*2d 392, 396 (3d Cir. 1988). There are, however, exceptions to the general rule.

Far less than the usual amount of deference to an agency interpretation is appropriate when that agency has failed to adopt a consistent interpretation in administering the statute in question. *INS v. Cardoza-Fonseca*, 480 *U.S.* 421, 446 n.30, 107 *S. Ct.* 1207, 1221 n.30, 94 *L. Ed.* 2d 434, 457 n.30 (1987) (citing *Watt v. Alaska*, 451 *U.S.* 259, 273, 101 *S. Ct.* 1673, 1681, 68 *L. Ed.* 2d 80 (1981); *General Elec. Co. v. Gilbert*, 429 *U.S.* 125, 143, 97 *S. Ct.* 401, 411-12, 50 *L. Ed.* 2d 343 (1976)).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 *U.S.* (1 Cranch) 137, 177, 2 *L. Ed.* 60 (1803). Statutory construction is ultimately a judicial function. *See, e.g., SEC v. Sloan*, 436 *U.S.* 103, 118, 98 *S. Ct.* 1702, 1712, 56 *L. Ed.* 2d 148, 161 (1978); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 *U.S.* 726, 745-46, 93 *S. Ct.* 1773, 1784-85, 36 *L. Ed.* 2d 620, 633-34 (1973). Indeed, "one of the Judiciary's characteristic roles is to interpret statutes." *Japan Whaling Ass'n v. American Catacean Soc'y*, 478 *U.S.* 221, 230, 106 *S. Ct.* 2860, 2866, 92 *L. Ed.* 2d 166, 179 (1986). Accordingly, the Supreme Court in *Chevron, supra*, did not state that silence or ambiguity in a statute automatically requires a court to delegate its entire interpretive responsibility to an agency, especially when an agency's interpretation is contrary to the purpose of the statute or inconsistent. *See West v. Bowen*, 879 F.2d 1122, 1138 (3d Cir. 1989) (Mansmann, J., concurring and dissenting).

Courts have found consistency or lack thereof in an agency interpretation to be crucial in determining the degree of deference to be afforded that interpretation. *See, e.g., INS v. Cardoza-Fonseca, supra* (rejecting deference to

Board of Immigration Appeals due to years of inconsistent positions); *Director, Office of Workers' Compensation Programs v. Mangifest*, 826 F.2d 1318, 1319-20 (3d Cir. 1987) (finding "ambiguities and inconsistencies in the Director's interpretation of . . . regulations . . . sufficiently great to preclude deference"); *Revak v. National Mines Corp.*, 808 F.2d 996, 1002 (3d Cir. 1986) (rejecting deference arguments due to inconsistent agency interpretation of statute); *Disabled in Action v. Sykes*, 833 F.2d 1113, 1117-19 (3d Cir. 1987), *cert. denied*, 485 U.S. 989, 108 S. Ct. 1293, 99 L. Ed. 2d 503 (1988). There is a great difference between flexibility and vacillation. Accordingly, judicial deference to administrative rulings should be cast on a sliding scale whereby the usual respect for agency determination diminishes as apparent inconsistencies surmount. *West, supra*, 879 F.2d at 1134 (Mansmann, J., dissenting and concurring).

The federal administrative understanding of the meaning of "interest" has wavered. *Cf. Copeland, supra*, ___ Colo. at ___ (slip op. at 13) (asserting that "[t]he OCC *consistently* has taken the position that late payment fees are interest" under both section 85 of the NBA and section 521 of the DIDA) (emphasis added). An examination of OCC interpretive letters reveals significant inconsistent administrative treatment of interest with respect to the NBA. As early as 1964, the OCC, responding to an inquiry to define interest under the NBA, stated that "late payment fees . . . would not properly be characterized as interest." *See* Letter by James J. Saxon, Comptroller of the Currency (June 25, 1964), Brief of Petitioner-Defendant at Ex C. (No. 38,817). Then, in 1986, the OCC was asked specifically whether late fees were considered interest

that could be exported under section 85. Letter by Charles F. Byrd, Assistant Director, Legal Advisory Service (May 5, 1986), 1986 *WL* 143937 (O.C.C.). The agency opined that section 85 looks to state law to determine the maximum permissible interest rate, but that federal law determines which charges are "material" to the rate determination. *Id.* at *1. Because courts had not determined whether late fees were material, the OCC refused to provide the answer. *Ibid.*

In 1988, however, the OCC issued Interpretive Letter No. 452, which addressed whether various fees charged by an out-of-state national bank to its credit cardholder in Iowa were material to the determination of the interest rate under Section 85. Letter by Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of Currency [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 at 78,063 (Aug. 11, 1988). The agency concluded that whether particular fees are material to the interest rate determination under section 85 depends on the laws of a national bank's home state. *Id.* at 78,065-66 (citing Interpretive Ruling 7.7310, 12 C.F.R. § 7.7310(a)).

The OCC recently has affirmed that position. *See* Letter by Peter Liebsman, Assistant Director, Bank Operations and Asset Division (February 26, 1993), 1993 *WL* 501557 at *2 (the "1993 OCC Letter"). However, because the State failed to define "materiality", the 1993 OCC Letter stated that "characteristics of either the loan or the borrower . . . [that are] an integral part of a bank's decision to establish the rate of interest that will be charged" typically are material. *Id.* at *3. Notably, the OCC opined that charges such as "late fees, nonsufficient check charges, cash advance fees and attorney fees

appear not to determine the numerical rate of interest to be charged." *Id.* at *4. Because such fees have only an "indirect effect on interest rates in that they may affect the ultimate return on loan proceeds," the agency suggested that absent their inclusion in the home-state's definition of interest, they would not be material, and thus, would not be exportable. *See Ibid.*

The conflicting interpretations, coupled with the logic expressed in the "materiality" standard, convince us that this Court should not forsake its own considered reasoning by relying on an equivocation. It is the responsibility of Congress to depart from the traditional understanding of interest and to express an intent to include non-numerical interest rates in its definition of "interest" under the NBA.

IV

New Jersey's banking statutes also reflect the basic understanding that the notion of interest was conceived and continues to be defined as specific percentage rates, rather than discrete charges, such as late fees, which are not directly related to borrowing money. *N.J.S.A.* 17:13A, which governs installment loan rate advertising, defines interest as follows:

> every charge paid to the lender or contracted for by the lender and the borrower in connection with or as an incident of a loan, whether designated as interest or as a financial charge or otherwise, *except that the term does not include the following charges when made pursuant to law: late or delinquency charges;* attorneys' and collection fees; insurance premiums, including premiums

> for credit life insurance; recording or filing fees, and all other charges which may lawfully be made on loans in addition to interest or finance charges.

[*N.J.S.A.* 17:13A-2(g) (emphasis added).]

Other statutes distinguish late fees from interest by either authorizing or prohibiting certain lending institutions from making such charges. *N.J.S.A.* 17:13-104b specifically authorizes New Jersey credit unions to charge late fees to its members.

> Notwithstanding the provisions of R.S. 31:1-1 to the contrary, a credit union may charge, contract for, and receive interest on loans at a rate or rates agreed to by the credit union and the member. A *credit union may charge late fees* and lawful fees paid to any public officer for filing, recording, or releasing a document, and may charge collection fees, not to exceed 20% of the principle [sic] balance and interest outstanding, which may be added to the principal balance of any loan placed for collection after default thereon.

[*N.J.S.A.* 17:13-104b (emphasis added).]

N.J.S.A. 17:9A governs a banking institution's authority to make check loans and other loans, *N.J.S.A.* 17:9A-59.1 to -59.17, small business loans, *N.J.S.A.* 17:9A-59.25 to -59.39 and loans secured by a deposit, *N.J.S.A.* 17:9A-59.40-63. In defining the amount of interest permitted on each class of loans, the respective statutes specifically include only percentage *rate* interest, not other financial charges. Other charges are provided for in separate sections. For example, *N.J.S.A.* 17:9A-59.6, sets the

rate of interest for advance loans. Later provisions provide for additional fees on advance loans, such as late charges, *N.J.S.A.* 17:9A-59.7, and service charges, *N.J.S.A.* 17:9A-59.8.

On the other hand, New Jersey's RISA prohibits lenders from charging late fees and other financial charges in addition to interest. The statute provides:

> No retail seller, sales finance company, or holder shall charge, . . . directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with . . . retail charge accounts other than the charges permitted by this act. . . .
>
> [*N.J.S.A.* 17:16C.50.]

At the time this case was before the Court, the statute expressly authorized delinquency or late-payment charges on only retail installment contracts. *N.J.S.A.* 17:16C-42(a). On March 7, 1995, however, the statute was amended by *L.* 1995, *c.* 43, § 1, which specifically allows for late-payment charges on retail charge accounts. It provides in pertinent part that:

> The holder of any retail charge account may collect a delinquency or collection charge in an amount not to exceed $10 if provided for in the retail charge account agreement, on any minimum payment which has not been paid in full

for a period of 10 days after its due date, as originally scheduled.

[*L.* 1995, *c.* 43, § 1.]

The effective date of the amendment was May 29, 1995, 90 days following its enactment. *L.* 1995, *c.* 43, § 2. Thus, for purposes of this appeal, defendant's late-fee charges were still illegal under RISA. This amendment to the statute indicates, however, that the legislature did not intend to include late-fee charges within its definition of interest; rather, it expressly specified when and under what conditions other non-percentage rate charges could be procured by lenders in addition to annual interest rate charges.

Moreover, the regulations governing banking specifically provide for the maximum *rate* of interest to be charged on the issuance of different types of loans. *N.J.A.C.* 3:1-1.1; *N.J.A.C.* 3:1-1.2. These regulations governing interest say nothing about other financial charges, such as late fees. Thus, the manner in which both the Legislature and the Department of Banking have chosen to regulate lender-authorized charges clearly supports the conclusion that late fees are distinct from interest and thus not contained within the accepted definition of interest. The dissent incorporates late fees, and presumably other similar charges, into the notion of traditional interest by homogenizing what the Legislature has meticulously separated. It does so only by obscuring the clear language and structure of the legislative treatment of interest and late fees. *See Post* at ___ (slip op. at 24-28).

The State Bank Parity Act, *N.J.S.A.* 17:13B-1 to -2, authorizes New Jersey banks to charge the same "rate of

interest" charged by credit unions. *N.J.S.A.* 17:13B-2 provides:

> Notwithstanding any provisions of R.S. 31:1-1 or any other statute to the contrary, any bank, savings bank, savings and loan association or credit union may charge a *rate* of interest on any class or type of loan at the rate of interest permitted to any other lender by the laws of this State on that class or type of loan.
>
> [*N.J.S.A.* 17:13B-2 (emphasis added).]

The Assembly Banking and Insurance Committee Statement that accompanied this legislation indicates that the act was intended as a state-bank companion to section 85 of the NBA.

> This legislation would give state chartered banks, savings banks, savings and loan associations, and credit unions the same "most-favored-lender" authority that national banks presently enjoy. . . . In practice, a national bank may charge interest on any type of loan at the highest rate allowed to any lender in the state making any similar type of loan. Thus, in certain cases, national banks may now use the rate permitted to be charged by secondary mortgage loan licensees, small loan companies (this rate will now apply to bank credit cards because of legislation passed last year), or home repair contractors. This legislation, therefore, provides parity to state-chartered institutions.
>
> [Assembly Banking & Insurance Committee, *Statement to Assembly Bill No. 1986* (1981).]

Thus, while the Act provides for parity between the rates of interest charged by both banks and credit unions, the act does not explicitly authorize banks to charge other types of fees. Furthermore, there is no indication that the Legislature implicitly intended these other fees in the State Bank Parity Act. Indeed, the fact that the Legislature has passed separate statutes that expressly authorize the imposition of discrete fees and charges, (see discussion, *supra*, at ___ (slip op. at 24-28)), in contrast to interest, underscores the understanding that those types of charges are not contemplated by the State Bank Parity Act. The clearest indication of the Legislature's intent to distinguish between interest rates and late fees is in the language of its recent amendment to RISA, in which it expressly authorizes holders of retail charge accounts, as well as retail installment contracts, to charge late fees. The Legislature obviously enacted this law because it wanted to enable banks and other retail charge-account holders to charge late fees that credit unions were permitted to charge under *N.J.S.A.* 17:13-104b. Had the State Bank Parity Act provided parity between lenders as to specific non-interest rate charges, there would have been no need for the amendment because holders of retail charge accounts would have been entitled, pursuant to the parity act, to charge the late fees that credit unions were authorized to charge. Courts should avoid a construction that would render legislative enactments meaningless. *State v. Reynolds*, 124 *N.J.* 559 (1991). Thus, by excluding discrete charges from the parity act, the Legislature retained flexibility with respect to the non-percentage rate fees different lenders were permitted to charge their customers. For example, retail charge account

holders are limited to a $10 late-fee per default period, while credit unions have no such limitation.

The language of RISA itself indicates the legislative intent to leave room for subsequent legislative initiatives to allow different lenders to make discrete non-percentage rate charges; it states that a retail seller, sales finance company or holder cannot charge additional fees or charges "other than the charges permitted by this act." Thus, the Legislature, in reserving within the statute the ability to authorize certain charges, has correctly recognized that there may be specific reasons for treating different lenders differently. For example, there may be specific reasons for allowing a credit union, rather than a bank, to charge late fees. Credit unions are small, individualized lenders which do not cater to a large market. Furthermore, credit unions have a genuine social welfare purpose. In assisting their members they cannot spread costs like banks. Thus, they must be permitted to take actions, such as charging late fees, to help insure their solvency.

The dissent points to a letter from the Department of Banking to support its theory that the State Bank Parity Act includes late fees in its definition of interest. *Post*, at ___ (slip op. at 27-28) (citing Letter from Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994)). Relying on an informal and isolated expression of agency interpretation has limited authoritative weight and does little to buttress its argument. Here, we are not presented with duly promulgated regulations that express legislative intent. *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 331 (1984) (emphasizing that procedural requirements for passage of rules, involving

notice and public participation, are given authoritative weight). Nor are we confronted with even a course of regulatory conduct that reflects a clear and consistent administrative understanding as evidence of an underlying legislative intent. *Body-Rite Repair Co., Inc. v. Director, Div. of Taxation*, 89 *N.J.* 540, 545-46 (1982) (holding that practical administrative construction of statute over period of years without interference by Legislature is evidence of conformity with legislative intent and should be given great weight by court). Clearly, a single letter from the Department of Banking does not constitute a settled or widespread course of administrative conduct that can be equated with the interpretive authority of a duly promulgated rule. Moreover, it cannot provide a meaning that is neither expressed in the statute, nor in the legislative scheme governing banking. Our deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by statutory language. *In re Adoption of N.J.A.C.* 7:26B, 128 *N.J.* 442, 450 (1992) (citation omitted).

This Court has found no legislative authority to support the contention that interest in the context of either the State Bank Parity Act or the NBA encompasses a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate. Thus, we can conclude only that neither Congress, in passing the NBA, nor the New Jersey Legislature, through its own parity act, intended to include late fees in its definition of interest for the purpose of preventing discrimination against out-of-state lenders.

V

Defendant argues that although the new RISA amendment is inapplicable to the charges assessed in this case, the fact that New Jersey credit unions were permitted to charge late fees at the time defendant procured those fees, pursuant to the most-favored-lender doctrine, entitled out-of-state national banks, like defendant, to charge late fees. We disagree.

Although a national bank may "borrow" the interest rate from any lending institution in its home state, without regard to whether that institution is actually "competitive" with a national bank, a national bank is not authorized to charge late fees simply because a state credit union is so authorized in a state other than its home state. Inter-state parity, as established in *Marquette*, is commonly identified as the notion that a national bank is entitled to export the interest authorized by its home state to borrowers located in other states that authorize a lower interest rates [sic]. *Marquette, supra*, 439 *U.S.* at 313-14, 99 *S. Ct.* at 548, 58 *L. Ed.* 2d at 545. The defendant seeks to extend this inter-state parity notion by arguing that a foreign national bank lending to customers in New Jersey is entitled to charge the interest authorized by the state in which the bank is located *or* the interest authorized in New Jersey, whichever is higher, and that for purposes of determining what interest can be exported, all of the extra charges authorized by the borrower's state can be included as well. Thus, it argues a foreign national bank can charge late fees because New Jersey credit unions are permitted to charge them and, under the most-favored-lender doctrine, national banks can charge the same interest – in its most expansive form – as any state lender. The

argument, we find, overreaches the federal statutory scheme.

Section 85 of the NBA provides in pertinent part:

> Any [national bank] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at a rate allowed by the laws of the State, Territory, or District where the bank is located,* or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except where by the laws of any State a different rate is limited for banks organized under state laws, *the rate so limited shall be allowed for associations organized or existing in any such state* under this chapter.
>
> [12 *U.S.C.A.* § 85 (emphasis added).]

Section 86 reads in pertinent part:

> The taking, receiving, reserving or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest . . . In case the greater rate of interest has been paid, the person by whom it has been paid, . . . may recover back, . . . twice the amount of the interest thus paid. . . .
>
> [12 *U.S.C.A.* § 86.]

For purposes of section 85, a national bank is located either in the place designated in its organizational certificate or in the places in which it has established authorized branches. *Marquette, supra,* 439 *U.S.* at 309 n.21, 99

S. Ct. at 546 n.21, 58 *L. Ed.* 2d at 542-43 n.21. A plain reading of the statute and most cases interpreting it indicate that a national bank is permitted to charge the interest rate of the state in which it is located, *not* the interest rate of the state in which the out-of-state customer is located. *Id.* at 301, 99 *S. Ct.* at 542, 58 *L. Ed.* 2d at 537-38 (ruling that section 85 authorizes a national bank based in one state to charge its out-of-state credit card customers an interest rate on unpaid balances allowed by its home state, when that rate is greater than that permitted by the state of the bank's nonresident customers); *Cades v. H & R Block, Inc.*, 43 *F.*3d 869, 874 (4th Cir. 1994) (determining that Delaware law applied to fix the interest rate when the bank located in Delaware, even though the loan occurred in South Carolina; "section 85, which looks to the interest rates allowed by the state where the bank is located – not where the borrower is located or where the loan transaction may be said to have occurred").

Moreover, there is some indication that it is illegal for a national bank to charge interest in excess of that amount permitted in its home state. In *Panos v. Smith, supra,* 116 *F.*2d 446, the court read sections 85 and 86 together to find that the NBA forbids a national bank to collect a higher rate of interest than is permitted by the law of the state in which it is located. Although none of these cases specifically dealt with a situation where the interest in the state of the customer was higher or more permissive than the national bank's home state, the basic understanding that resort to the higher level of interest would not be allowed is readily inferable from their treatment of the subject.

The theory of the NBA, as applied by federal and state courts, is that the borrower's state usury laws can be discarded because the customer either taking out a loan or using her "lender credit card" partakes in a transaction in the national lender's home state. *See Marquette, supra,* 439 *U.S.* at 318-19, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548 (recognizing that impairment of state usury laws "has always been implicit in the structure of the National Bank Act, since citizens of one state were free to visit a neighboring state to receive credit at foreign interest rates"); *Schumacher v. Lawrence, supra,* 108 *F.2d* 576, 577 (6th Cir. 1940) (stating that the question whether the rate of interest charged by a national bank is usurious is decided according to the law of the state in which the transaction occurs); *Haas v. Pittsburgh Nat'l Bank,* 60 *F.R.D.* 604, 608 n. 3 (W.D.Pa. 1973) (same); *Fisher v. First Nat'l Bank, supra,* 548 *F.*2d at 257 ("A[n] [Iowa] customer using this "lender credit card" . . . communicates or indicates his intention to establish the credit card arrangement with BankAmericard when the lender, through banking channels, receives in the State of Nebraska the draft of the customer."). It is clear that Congress intended that the NBA and DIDA immunize national banks and out-of-state federally insured banks that lend money beyond their home-state's borders from local usury laws that might give local banks a competitive advantage. *E.g., Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64 (holding that Congress, by enacting NBA, intended to protect national banks from hostile state usury laws); *Sherman,* 272 *N.J. Super.* at 440 (same); *Hunter,* 272 *N.J. Super.* at 530 (same); 12 *U.S.C.A.* 1831d(a) (permitting State-chartered insured depository institutions to charge interest rates permitted in their

home state "[i]n order to prevent discrimination against State-chartered insured depository institutions"). Thus, the statutes were intended to prohibit states from forcing national banks to charge a lower rate of interest to customers located outside of the national bank's home state than they would be permitted to charge their customers located in the home state.

We do not believe prohibiting national lenders from charging the rate of interest permitted by the laws of a foreign state would be considered discrimination when the national bank was not organized in that state and would not be able to charge higher interest rates except by taking advantage of the laws of the foreign state. New Jersey's RISA does not conflict with the most-favored-lender doctrine in this case, and thus New Jersey should be permitted to prohibit out-of-state lenders from charging late-fees to New Jersey residents, because, at the outset of this case, New Jersey banks were also prohibited from charging those fees. This finding would enable state usury laws to remain vital and controlling over non-interest rate credit terms. Consumer credit protection is a fundamental local interest, long recognized by Congress, and it thus should not be displaced by the sweeping preemption urged by defendant.

Because at the time of this appeal, RISA prohibited both New Jersey and national retail charge account holders from charging late fees, we hold that defendant's late-fee charges violated this state's usury laws and are thus impermissible.

VI

Although the late-fee charges at issue in this case are impermissible under the RISA statute as it existed when those fees were assessed, we acknowledge, as suggested by the parties, that such charges assessed after May 29, 1995 do not appear to be illegal under that statute. As earlier discussed, *supra* at ___ (slip op. at 28.29), the Legislature amended the statute to permit "the holder of any retail charge account [to] collect a delinquency or collection charge" of no more than $10. *L.* 1995, *c.* 43, § 1. Pursuant to the statute, a "holder" is "any person, including a retail seller, who is entitled to the rights of a seller under a retail installment contract or retail charge account." *N.J.S.A.* 17:16C-1(m). A "retail charge account" is

> any account . . . established by agreement which prescribes the terms under which a retail buyer may from time to time purchase or lease goods or services which are primarily for personal, family or household purposes, and under which the unpaid balance thereunder, whenever incurred is payable in one or more installments and under which a time price differential may be added in each billing period as provided herein. Retail charge account also includes all accounts arising out of the utilization by the holder of a credit card . . . issued by a sales finance company, giving the holder the privilege of using the credit card . . . to become a retail buyer in transactions out of which debt arises.
>
> [*N.J.S.A.* 17:16C-1(r).]

Although the statute does not expressly include banks within these definitions, clearly banks have for years

been performing the functions attributable to holders of retail charge accounts. *See N.J.S.A.* 17:3B-4 to -28 (Market Rate Consumer Loan Act) (authorizing New Jersey banks to offer revolving credit plans at an interest rate agreed to by lender and borrower); *N.J.S.A.* 17:9A-59.1 (permitting advance loans by banks). In fact, the statute expressly provides that "any banking institutions authorized to do business in this State, shall be authorized to transact business as a sales finance company." *N.J.S.A.* 17:16C-2. Thus, it appears that the Legislature intended to include banks that issue credit cards within those institutions authorized to assess late charges on overdue charge accounts. Therefore, a bank may contract to charge the delinquency fee on the same basis as any other "holder of any retail charge account" in New Jersey.

Nothing in the statute indicates a legislative intention to allow state banks to charge delinquency fees while prohibiting national banks and federally-insured state banks from assessing those fees. In fact, the statute defines banking institutions generally as "any bank, national banking association, savings bank or federally chartered savings bank authorized to do business in this State". *N.J.S.A.* 17:16C-1(n). There is no distinction between a national banking association and an association under state laws except where the distinction is specifically made by Congress. *Anderson v. First Nat'l Bank,* 54 *F. Supp.* 937 (D.Idaho 1944). States may not discriminate against national banks with respect to general contract terms or charges. *See Anderson Nat'l Bank v. Luckett,* 321 *U.S.* 233 (1944) (national banks are subject to state laws unless those laws infringe upon national banking laws or impose undue burden on performance of

bank's functions); *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). Thus, national banks, as well as federally-insured state banks, are permitted to charge the late fees authorized by statute to the same extent as state banks.

However, New Jersey retains the authority to regulate on a non-discriminatory basis all non-interest rate contractual terms and conditions of a bank as a holder of a retail charge account. The Supreme Court has held that state law controls a bank's right to collect its debts.

> [National banks] are governed in their daily course of business far more by the laws of the State than of a nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.
>
> [*National Bank v. Commonwealth*, 6 *U.S.* (9 Wall) 353, 362, 19 *L. Ed.* 70 (1870).]

Thus, it would appear that a national bank and a federally-insured state bank may, as of May 29, 1995, charge a delinquency fee in accordance with the authorization now given by the statute. *See L.* 1995, *c.* 43.

VII

The judgment of the Appellate Division is reversed.

Chief Justice Wilentz and Justices Stein and Coleman join in Justice Handler's opinion. Justice Pollock has filed

a separate dissenting opinion in which Justice Garibaldi joins. Justice O'Hern has also filed a separate dissenting opinion.

SUPREME COURT OF NEW JERSEY
A-102 September Term 1994

MARC SHERMAN, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Defendant-Respondent.

POLLOCK, J., dissenting.

This appeal poses the question whether a national bank located in South Dakota may impose a late charge on a credit-card customer who resides in New Jersey, if South Dakota permits the charge, but New Jersey does not. More specifically, the appeal focuses on whether the definition of "interest" in the National Bank Act (NBA), 12 *U.S.C.A.* § 85 (section 85), includes late charges, and, if so, whether that statute preempts the New Jersey Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-1 to -94 (RISA).

In a class-action complaint brought on behalf of himself and other Citibank credit cardholders, petitioner, Marc Sherman, asserts that the RISA precludes defendant, Citibank (South Dakota), N.A. (Citibank), a national banking association located in South Dakota, from imposing late charges on cardholders located in New Jersey. The Law Division granted Citibank's motion to dismiss the complaint with prejudice. The Appellate Division affirmed. 272 *N.J. Super.* 435. The majority reverses. I dissent.

-I-

Because the appeal arises from the grant of Citibank's motion to dismiss, I accept as true all facts alleged in the complaint. *See Bozza v. Vornado, Inc.*, 42 *N.J.* 355, 357-58 (1964). Sherman alleges that in 1989 Citibank sent to him at his New Jersey residence an application, Visa card, and Card Member Agreement. The record, however, does not include copies of these instruments. According to the complaint, the annual percentage-rate finance charge (periodic interest) is 19.8 percent. In addition, a cardholder who does not make the minimum payment within twenty-five days of the due date is subject to a fixed late-payment fee regardless of the amount of the outstanding balance or delinquent payment. Twice Sherman was late in making his monthly payment. Each time, Citibank imposed a late charge.

Sherman claims that the late charges violate various provisions of New Jersey's Consumer Fraud Act, *N.J.S.A.* 56:8-2 and -19, and of the RISA, *N.J.S.A.* 17:16C-50 and -54. The Fraud Act prohibits undisclosed late charges, and the RISA prohibits delinquency charges on revolving credit accounts. He also claims that the late fees constitute a common-law breach of contract and conversion. All claims depend on whether Citibank may impose late charges as interest.

The initial task is to determine the meaning of "interest" in section 85. That section permits national banks to charge borrowers "interest at the rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 85. South Dakota, the state where Citibank is located, defines "interest" to include late charges: "Interest is the

compensation allowed by law for the use, or forbearance, or detention of money or its equivalent, including without limitation . . . charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit." *S.D. Codified Laws Ann.* § 54-3-1 (1995). Citibank claims that as a South Dakota bank it may impose late charges on defaulting customers whether those customers are located in South Dakota, New Jersey, or anywhere else.

Sherman, however, relies on the RISA, which permits credit-card issuers to charge periodic interest, but not late fees: "No retail seller, sales finance company, or holder shall charge, . . . directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with . . . retail charge accounts. . . . " *N.J.S.A.* 17:16C-50. He claims that "interest" in section 85 refers to periodic interest, but not to late charges. Consequently, he denies that the RISA conflicts with the NBA.

-II-

Initially dividing the majority and the dissent is the meaning of the word "interest" as used in the NBA. Both agree that "interest" includes periodic interest, the amount paid for the use of money calculated as a percentage of the sum due for a stated period, typically one year. That definition, however, is not exhaustive. The meaning of the word becomes indeterminate at the margins. Webster's Dictionary, for example, accords "interest" seven

definitions, six with subparts. Definition 3(a) defines "interest" as "the price paid for borrowing money generally expressed as a percentage of the amount borrowed paid in one year. . . . " *Webster's Third New International Dictionary* (1976). The use of the adverb "generally" suggests the existence of other definitions. So construed, accepted usage recognizes that "interest" may include charges other than periodic interest. Consistent with that construction, the Supreme Court of California recently concluded that dictionary definitions of "interest" "then current in American legal usage" at the time of the passage of the NBA are broad enough to include late charges. *Smiley v. Citibank (South Dakota) N.A.*, 44 *Cal. Rptr.* 2d 441, 450-51 (1995).

More relevant than the meaning that lexicographers assign to statutory terms is the meaning assigned by the Legislature. To bridge the gap between dictionary definitions and legislative intent, the California Supreme Court apparently assumed that Congress consulted the dictionaries cited in *Smiley*. Dictionaries, however, are not essential to the judicial search for the meaning of statutory terms. *Cabnell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). To illustrate, when deciding that "interest" in the NBA includes late charges, the Colorado Supreme Court recently concluded "that the common dictionary definitions are not sufficiently precise to settle the question before us." *Copeland v. MBNA America, N.A.*, ___ *Colo.* ___ (1995) (slip op. at 9).

Absent an express statutory definition, courts may glean the meaning of legislative language from sources such as statutory history, purpose, and structure. In ascertaining the meaning of a statutory term, a court's

task is not to create its own definition, but to ascertain the definition intended by the Legislature. *E.g., Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 *U.S.* 117, 128, 111 *S. Ct.* 1156, 1163, 113 *L. Ed.* 2d 95, 106-07 (1991); *Roig v. Kelsey*, 135 *N.J.* 500, 515 (1994). The NBA does not expressly define "interest." Nor does a fair reading of the legislative history of the statute disclose the intended meaning of that term. Accordingly, I search elsewhere for the word's meaning in the NBA.

The early history of national banking sheds some light on congressional intent in the NBA. Before enacting the NBA, Congress twice had tried unsuccessfully to create a Bank of the United States. Each time, however, states'-rights advocates defeated attempts to renew the Bank's charter. *See* John J. Knox, *A History of Banking in the United States* 35-48, 51-71 (1900) (discussing creation and dissolution of Bank of the United States and Second Bank of the United States); Bray Hammond, *Banks and Politics in America* 197-226, 369-450 (1957) (same). Then, in 1864, responding to the economic turmoil created by the Civil War, Congress adopted the NBA. Among other things, the NBA re-established a system of national banks. *See* Knox, *supra*, at 91-111 (discussing NBA); Hammond, *supra*, at 718-34 (same). To overcome local prejudice in favor of state banks, Congress included section 85. By mandating interest-rate parity in section 85, Congress sought to provide a level playing field for national banks throughout the United States. *See* Knox, *supra*, at 235-69. Although helpful, the history of the NBA is not dispositive of the meaning of interest in the NBA. *Copeland, supra*, ___ *Colo.* at ___ (slip op. at 10).

The United States Supreme Court first construed section 85 in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 21 *L. Ed.* 862 (1873). The plaintiff, Tiffany, challenged the legality of the ten-percent interest rate charged to Missouri borrowers by the defendant, National Bank of Missouri. Missouri's usury laws limited to eight percent the interest rate that state-chartered banks could charge, but allowed non-bank lenders to charge interest at a rate of ten percent. *Id.* at 411, 21 *L. Ed.* at 863. Reasoning that section 85 permitted the defendant national bank to charge interest at a "rate allowed by the laws of [Missouri]", the Court held that the bank could charge the highest interest rate that could be charged by any lender in that state. *Id.* at 411-13, 21 *L. Ed.* at 863-64. In so holding, the Court required states to treat national banks as a "most favored lender." *Id.* at 413, 21 *L.Ed.* at 864. Although the Court acknowledged that its holding might disadvantage state-chartered banks, it relied on the overriding congressional intent to create a strong national banking system immune from unfriendly state legislation. *Id.* at 412-13, 21 *L. Ed.* at 863-64. "National banks," the Court declared, are "national favorites." *Id.* at 413, 21 *L. Ed.* at 864.

Over a century later, the Court revisited section 85 in *Marquette National Bank v. First of Omaha Service Corp.*, 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978). The plaintiff, Marquette National Bank of Minnesota (Marquette), challenged the interest rate charged by a Nebraska national bank to Minnesota credit cardholders. Minnesota law prohibited banks in that state from charging more than twelve percent on credit-card balances, but allowed them to charge an annual fee up to $15. *Id.* at

302-03, 99 *S. Ct.* at 542-43, 58 *L. Ed.* 2d at 538. Nebraska law, however, allowed banks to charge up to eighteen percent on outstanding credit-card balances below $1,000. *Id.* at 302, 99 *S. Ct.* at 542, 58 *L. Ed.* 2d at 538. First National Bank of Omaha (Omaha Bank), a national bank chartered in Nebraska, charged eighteen percent interest on outstanding balances of Minnesota credit cardholders. *See id.* at 304, 99 *S. Ct.* at 543, 58 *L. Ed.* 2d at 539. Marquette claimed it was losing customers to Omaha Bank because "Marquette was forced by the low rate of interest permissible under Minnesota law to charge a $10 annual fee for the use of its credit cards." *Ibid.*

The Court determined that although the cardholders lived and made credit-card purchases in Minnesota, Omaha Bank was "located" in Nebraska. *Id.* at 310-13, 99 *S. Ct.* at 546-48, 58 *L. Ed.* 2d at 543-45. Consequently, Omaha Bank could charge the favorable Nebraska rate to its customers in Minnesota. *Id.* at 313-14, 99 *S. Ct.* at 548, 58 *L. Ed.* 2d at 545. As in *Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64, the Court noted the clear congressional intent to favor national banks, even at the expense of state banks. *Marquette Nat'l Bank, supra,* 439 *U.S.* at 314-18, 99 *S. Ct.* at 548-50, 58 *L. Ed.* 2d at 545-48.

Although *Tiffany* and *Marquette* discussed permissible rates of interest under section 85, they did not define "interest." Recent federal decisions, however, illuminate the meaning of interest in section 85. *See Greenwood Trust Co. v. Massachusetts,* 971 *F.* 2d 818 (1st Cir. 1992), *cert. denied,* ___ *U.S.* ___, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993); *Tikkanen v. Citibank (South Dakota), N.A.,* 801 *F. Supp.* 270 (D. Minn. 1992).

Greenwood Trust involved a federally-insured state bank chartered in Delaware that issued credit cards throughout the United States, including Massachusetts. 971 *F.* 2d at 821. The bank, Greenwood Trust Company, imposed late charges on its delinquent credit-card customers. Delaware law, like South Dakota law, characterizes late charges as "interest." *Id.* at 829. The state claimed that Massachusetts' consumer-protection law, like the RISA, prohibited late charges. *Id.* at 821. Greenwood Trust argued, however, that by reference to the law of Delaware, the Depositary Institutions Deregulation and Monetary Control Act of 1980 (DIDA) authorized it to charge late fees as interest.

Section 521 of the DIDA grants the same protection to federally-insured state banks that section 85 of the NBA provides to national banks. Section 521 provides that any federally-insured state bank may,

> notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be the greater. . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The United States Court of Appeals for the First Circuit ruled that under section 521 Greenwood Trust

could charge its Massachusetts cardholders the highest interest rate allowed by Delaware law. *Greenwood Trust, supra,* 971 *F.* 2d at 827. The court determined that both Delaware's express statutory provision, *Del. Code Ann.* tit. 5, § 950 (1994), and federal common law support a broad definition of "interest" that includes late fees. 971 *F.* 2d at 829-30 (citing *American Timber & Trading Co. v. First Nat'l Bank,* 690 *F.* 2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Fisher v. First Nat'l Bank,* 548 *F.* 2d 255, 258-61 (8th Cir. 1977) (cash-advance fee); *Panos v. Smith,* 116 *F.* 2d 445, 446-47 (6th Cir. 1940) (mortgage, taxes, and recording fees); *Cronkleton v. Hall,* 66 *F.* 2d 384, 387 (8th Cir.) (bonus or commission), *cert. denied,* 290 *U.S.* 685, 54 *S. Ct.* 121, 78 *L. Ed.* 590 (1933); *Nelson v. Citibank (South Dakota) N.A.,* 794 *F. Supp.* 312, 318 (D. Minn. 1992) (late fees)). Thus, the court concluded that for purposes of section 521, "interest" includes late fees, and that Greenwood Trust could "export" those charges authorized by Delaware law to Massachusetts. *Greenwood Trust, supra,* 971 *F.* 2d at 831.

The vast majority of state and federal courts have followed *Greenwood Trust. E.g., Ament v. PNC Nat'l Bank,* 849 *F. Supp.* 1015 (W.D. Pa. 1994); *Watson v. First Union Nat'l Bank,* 837 *F. Supp.* 146 (D.S.C. 1993); *Goehl v. Mellon Bank,* 825 *F. Supp.* 1239 (E.D. Pa. 1993); *Smiley, supra,* 44 *Cal. Rptr.* 2d at 453; *Stoorman v. Greenwood Trust Co.,* 888 *P.* 2d 289 (Colo. Ct. App.), *rehearing denied,* ___ *Colo. Ct. App.* ___ (1994), *cert. granted,* ___ *Colo.* ___ (1995); *Copeland, supra,* ___ *Colo.* ___; *Sherman, supra,* 272 *N.J. Super.* 435; *Hunter v. Greenwood Trust Co.,* 272 *N.J. Super.* 526 (App. Div. 1994).

Tikkanen, supra, 801 *F. Supp.* 270, reached the same conclusion under section 85 as *Greenwood Trust* had reached under section 521. In *Tikkanen,* which is virtually identical to this appeal, the plaintiff argued that section 85's definition of interest was restricted to numerical periodic interest rates and did not include late-payment charges authorized by South Dakota, the defendant national bank's home state. 801 *F. Supp.* at 277. The federal district court held, however, that interest under section 85 was not limited to percentage-rate charges and could include fixed late fees. *Id.* at 276-78. Although the court did not announce a federal definition of interest that included late fees, it held that if a national bank's home state defines interest to include such fees, then the bank may "export" those fees under section 85. *Id.* at 279.

Rejecting the *Greenwood Trust* and *Tikkanen* line of cases, lower courts in Pennsylvania have held that "interest" does not include late-payment fees. *Mazaika v. Bank One, Columbus, N.A.,* 653 *A.* 2d 640 (Pa. Super. 1994), *appeal granted,* 659 *A.*2d 557 (Pa. 1995); *Gadon v. Chase Manhattan Bank,* 653 *A.* 2d 697 (Pa. Super. 1995) (following *Mazaika*). One United States District Court has reached a similar conclusion. *Copeland v. MBNA America, N.A.,* 820 *F. Supp.* 537 (D. Colo. 1993) (denying federal jurisdiction based on complete preemption defense because "ordinary meaning" of interest does not encompass late fees).

In *Mazaika, supra,* 653 *A.* 2d at 646, a Pennsylvania intermediate appellate court stated that "[i]t would appear beyond peradventure that the plain and ordinary meaning of the term 'interest' or 'interest rate' does not include late fees, . . . or the like which are not levied on a percentage basis." I find, however, that the meaning of

"interest" and "rate of interest" are not as plain as the *Mazaika* court found them. As the OCC has concluded, *infra* at 16-17, interest could include all charges for the "use or forbearance of money," including late fees. *See Brown v. Hiatts*, 82 *U.S.* (15 Wall.) 177, 185, 21 *L. Ed.* 128, 131 (1872).

-III-

The modern history of banking has been one of expanding regulation. Banks are subject to regulation by multiple federal agencies. The Comptroller of the Currency, 12 *U.S.C.A.* § 1; the Federal Housing Finance Board, 12 *U.S.C.A.* § 422a; the National Credit Union Administration, 12 *U.S.C.A.* § 1752a; the Federal Deposit Insurance Company, 12 *U.S.C.A.* § 1811; the Office of Thrift Supervision, 12 *U.S.C.A.* § 1462a; and the Board of Governors of the Federal Reserve System, 12 *U.S.C.A.* § 248, all regulate various aspects of banking. In addition, banks often are subject to dual regulation by state banking authorities.

With banking, as with other heavily-regulated commercial activities, Congress has recognized that it cannot maintain an efficient regulatory system through constant recourse to the legislative process. *See* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.1 (3d ed. 1994) ("It is impossible to draft a statute with sufficient precision and foresight to resolve each of the hundreds of issues that are likely to arise during the life of the statute."); Cass R. Sunstein, *Law and Administration*

after Chevron, 90 *Colum. L. Rev.* 2071, 2088 (1990) ("Congress is unable to amend every statute to account for . . . changes. . . . "). Consequently, it has authorized administrative agencies to implement specific congressional objectives. When Congress delegates authority to an administrative agency, the judicial role is not to pass on the wisdom of an agency's decision, but to assure that the agency has not abused its delegated authority. Davis & Pierce, *supra*, at § 3.3; Antonin Scalia, *Judicial Deference to Administrative, Interpretations of Law*, 1989 *Duke L.J.* 511, 516; Richard J. Pierce, Jr., *Chevron & Its Aftermath: Judicial Review of Agency interpretations of Statutory Provisions*, 41 *Vand. L. Rev.* 301, 307-08 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 *Yale J. on Reg.* 283, 300-04 (1986).

Absent clear indicia of legislative intent, courts often look for guidance to the administrative agency entrusted with the regulation of matters covered by a statute. *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. ___, ___, 115 *S. Ct.* 810, 813-14, 130 *L. Ed.* 2d 740, 748 (1995); *Chevron, U.S.A., Inc. v. NRDC*, 467 *U.S.* 837, 842-44, 104 *S. Ct.* 2778, 2781-83, 81 *L. Ed.* 2d 694, 702-03 (1984); *Blum v. Bacon*, 457 *U.S.* 132, 141, 102 *S. Ct.* 2355, 2361, 72 *L. Ed.* 2d 728, 736 (1982); *Lammers v. Board of Educ.*, 134 *N.J.* 264, 274 (1993); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 327 (1984). In *Nationsbank of North Carolina, N.A., supra*, 513 *U.S.* at ___, 115 *S. Ct.* at 813, 130 *L. Ed.* 2d at 747, the United States Supreme Court recently reiterated:

> " 'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged

> with enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.' " *Clarke v. Securities Industry Ass'n*, 479 *U.S.* 388, 403-404, 93 *L. Ed.* 2d 757, 107 *S. Ct.* 750, 771-72 (1987) (quoting *Investment Company Institute v. Camp*, 401 *U.S.* 617, 626-627, 28 *L. Ed.* 2d 367 91 *S. Ct.* 1091 (1971)).

In *Chevron*, the United States Supreme Court developed a two-part test for determining whether deference to an agency interpretation of a statute is appropriate. First, the statute that the agency purports to interpret must be unclear. 467 *U.S.* at 842-43, 104 *S. Ct.* at 2781-82, 81 *L. Ed.* 2d at 703. When Congress has not defined an important statutory term, courts fairly can presume that Congress intended the agency to provide a definition. *Id.* at 843-44, 104 *S. Ct.* at 2782, 81 *L. Ed.* 2d at 703; *see also* Davis & Pierce, *supra*, at § 3.3 (discussing *Chevron* and presumption of congressional delegation); Scalia, *supra*, at 516-17 (same).

In 1864, Congress may not have contemplated specifically that banks would issue credit cards or even that interest would include late fees. Even so, I believe that Congress intended to delegate to the OCC the authority to implement the goals of the NBA. Also likely, Congress intended that in meeting those goals the OCC would adapt to the changing needs of banks and their customers. That adaptation foreseeably includes administrative changes in the definition of "interest." In brief, I believe that federal banking regulators are in a better

position than state courts to define the meaning of "interest" in the NBA. That conclusion, in my opinion, also represents sound public policy. On a matter so essential to the national economy as the meaning of "interest" in federal banking legislation, the nation is better served by judicial deference to the judgment of Congress and the banking regulators.

The second part of the *Chevron* test directs courts to defer to reasonable agency interpretations. 467 *U.S.* at 844-45, 104 *S. Ct.* at 2782-83, 81 *L. Ed.* 2d at 704; *see also* Davis & Pierce, *supra*, at § 3.3; Scalia, *supra* at 516-18. Implicit in the notion of reasonableness is discretion in choosing among alternatives. In defining "interest" to include late charges, the OCC has made a reasonable choice among possible definitions of interest. Of course, if Congress should disagree with the agency's interpretation, it retains the authority to redefine the term. *See, e.g., CFTC v. Schor*, 478 *U.S.* 833, 845-46, 106 *S. Ct.* 3245, 3254, 92 *L. Ed.* 2d 675, 689 (1986) (suggesting that Congress's failure to overrule agency supports conclusion that agency definition comports with congressional intent).

The OCC consistently has determined that late-payment and certain other non-periodic fees are interest for purposes of section 85 of the NBA. In a recent interpretive letter, the agency concluded that a federal definition of "interest" under section 85 includes late fees. Letter by Julie L. Williams, Chief Counsel (Feb. 17, 1995), 1995 *WL* 419824 (O.C.C.). Earlier letters, although relying on the law of the national bank's home state, reached the same conclusion. *See* Letter by William P. Bowden, Jr., Chief Counsel (Feb. 4, 1992), 1992 *WL* 136390 (O.C.C.) at *9-*11 (concluding that state law determines fees material to

definition of interest) (the Bowden Letter); Letter by Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of Currency [1988-89 Transfer Binder] *Fed. Banking L. Rep.* (CCH) ¶ 85,676 at 78,063 (Aug. 11, 1988) (same) (the Serino Letter); Letter by Charles F. Byrd, Assistant Director, Legal Advisory Services (May 5, 1986), 1986 *WL* 143937 (O.C.C.) at *3 (concluding that state law determines maximum interest rate). *But see* Letter from Peter Liebesman, Assistant Director, Bank Operations and Assets Division (Feb. 26, 1993), 1993 *WL* 501557 (O.C.C.) at *9 (suggesting in *dicta* that late fees are not material to definition of interest absent state law conclusion to contrary). In sum, the OCC consistently has concluded that if a state allows any lender to charge interest in the form of late-payment fees, a national bank located in that state may charge those fees to its out-of-state borrowers.

To confirm that interest, for purposes of the NBA, includes late fees, the OCC recently promulgated proposed Interpretive Ruling § 7.4001 for inclusion in the Code of Federal Regulations. 60 *Fed. Reg.* 11924, 11940 (1995) (to be codified at 12 *C.F.R.* 7.4001) (proposed March 3, 1995). The proposed ruling states:

> The word "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for any extension of credit, the making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, . . . numerical periodic rates, late fees, not sufficient funds fees, overlimit fees, annual fees, cash advance fees, and membership fees.

If adopted, the proposed ruling would further evidence the OCC's conviction that late fees are interest. The majority's cavalier dismissal of the proposed ruling, *ante* at ___ (slip op. at 22), fails to consider the ruling's significance.

The agency's definition of "interest," as expressed in its interpretive letters, is clear. The judicial task is to determine whether that interpretation is reasonable. *Nationsbank, supra,* 513 *U.S.* at ___, 115 *S. Ct.* at 813, 130 *L. Ed.* 2d at 748; *Chevron, supra,* 467 *U.S.* at 843-44, 104 *S. Ct.* at 2782-83, 81 *L. Ed.* 2d at 704. In its February 17, 1995, interpretive letter, *supra,* the OCC documented early federal case law that defined "interest" as the "compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention." *Brown, supra,* 82 *U.S.* (15 *Wall.*) at 185, 21 *L. Ed.* at 131. The letter then concludes that late-payment fees, which legitimately compensate lenders for increased lending costs and risks associated with delinquent borrowers, are interest.

The OCC's conclusion is reasonable. It permits a national bank to charge any fees related to the use of money, if those charges are authorized by the bank's home state. That concept of parity comports with the NBA's goal of preventing discrimination against national banks. No principled reason confines the NBA to periodic interest rates.

Contrary to the protestations of the majority, *ante* at ___ (slip op. at 22-26), the evolution of the OCC's analysis does not render its opinion unworthy of judicial deference. *Chevron* counsels that an agency's change in a policy

determination is not necessarily entitled to less respect because of the change. *See* 467 *U.S.* at 863-64, 104 *S. Ct.* at 2792, 81 *L. Ed.* 2d at 715-16; Scalia, *supra*, at 517-19 (discussing *Chevron's* rejection of consistency requirement); Starr, *supra*, at 297-98 (same). Although the agency's analysis may have evolved over time, the analytical path has consistently led to the conclusion that national banks may export late fees. Late charges, moreover, are sufficiently close to the essence of "interest" to justify the OCC's decision to include them within the meaning of the word. The prototypical definition of "interest" as periodic interest is broad enough to encompass late charges. *See generally* Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 *Wash. U. L.Q.* 1069 (1995) (discussing definitional and prototypical interpretations of statutory language). I accept the conclusion of the banking regulators that interest for purposes of the NBA may include late charges and other fees charged by lenders in connection with a loan.

-IV-

-A-

Having determined that section 85's definition of "interest" includes late fees, the next question is whether that definition preempts the RISA's prohibition against the imposition of such fees. More specifically, the question is whether Congress intended that the NBA, as interpreted by the OCC, should preempt state law.

Congress may preempt a state law by expressly stating that it so intends, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 *U.S.* 504, ___, 112 *S. Ct.* 2608, 2617, 120 *L. Ed.* 2d 407,

422-23 (1992); by occupying an entire field of regulation, *e.g., Rice v. Santa Fe Elevator Corp.*, 331 *U.S.* 218, 230, 67 *S. Ct.* 1146, 1152, 91 *L. Ed.* 1447, 1459 (1947); or by enacting a federal statute that conflicts with a state law, *Hillsborough County, supra*, 471 *U.S.* at 713, 105 *S. Ct.* at 2375, 85 *L. Ed.* 2d at 721; *Maryland v. Louisiana*, 451 *U.S.* 725, 747, 101 *S. Ct.* 2114, 2129, 68 *L. Ed.* 2d 576, 596 (1981).

Section 85 does not contain an express preemption clause. Given the dual regulation of banking by state and federal regulators, Congress may not have occupied completely the field of banking regulation. The question becomes whether section 85's definition of "interest," which permits national banks to impose late fees, conflicts with the RISA's prohibition of such fees.

My analysis begins with the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
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> [*U.S. Const., art.* VI, *cl.* 2.]

Ever since *Gibbons v. Ogden*, the Supremacy Clause has mandated preemption of state laws that "interfere with, or are contrary to the laws of Congress. . . . " 22 *U.S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1824). Notwithstanding the supremacy of federal law, the United States Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims

of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 *U.S.* ___, ___, 115 *S. Ct.* 1671, 1676, 131 *L. Ed.* 2d 695, 704 (1995); *see Maryland, supra*, 451 *U.S.* at 747, 101 *S. Ct.* at 2129, 68 *L. Ed.* 2d at 595; *Rice, supra*, 331 *U.S.* at 230, 67 *S. Ct.* at 1152, 91 *L. Ed.* at 1459. The Court, however, has found conflict to be preemptive when "compliance with both federal and state [laws] is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 *U.S.* 132, 142-43, 83 *S. Ct.* 1210, 1217-18, 10 *L. Ed.* 2d 248, 257 (1963). It likewise has recognized preemption of state law when that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 *U.S.* 52, 67, 61 *S. Ct.* 399, 404, 85 *L. Ed.* 581, 587 (1941). Preemption is not foreclosed, however, merely because a federal statute displaces a traditional subject of state regulation. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 *U.S.* 141, 153, 102 *S. Ct.* 3014, 3022, 73 *L. Ed.* 2d 664, 675 (1982); *Greenwood Trust, supra*, 971 *F.* 2d at 828. To constrict unduly a federal statute to avoid interference with a state law would subvert the Supremacy Clause.

Against that background, the question recurs whether section 85, which permits a national bank to impose a late fee, and the RISA, which prohibits such a fee, are in conflict. In one sense, to state the question is to answer it. When state law prohibits an act that federal law permits, the conflict is apparent. True, section 85 does not mandate that national banks must charge late fees. The problem arises only when the national bank seeks to impose a late fee. By foregoing late fees, Citibank could

avoid the conflict. That analysis, however, begs the question.

As with ascertaining the meaning of "interest," I find guidance on the question of preemption in the rulings of the OCC. In her February 17, 1995, letter, *supra*, OCC Chief Counsel Julie Williams ruled:

> [W]e reaffirm our previous conclusion that "interest" permitted under section 85 may be charged without reference to whether all or part of it is permissible under the laws of the state where the customer resides. If the law of the state where the customer resides is different from the law of the state in which the bank is located, the former law has no effect on what the bank may charge as "interest."

Accord the Bowden Letter, *supra;* the Serino Letter, *supra; see also* Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 92-47, *Fed. Banking L. Rep.* (CCH) ¶ 81,534 at 55,730-31 (July 8, 1992) (reaching same conclusion under section 521); Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 93-27, *Fed. Banking L. Rep.* (CCH) ¶ 81,635 at 55,838-39 (July 12, 1993) (same).

Admittedly, an agency statement according a preemptive effect to a statute is not as persuasive as an express statutory clause. Given the pervasive role that Congress has entrusted to federal banking regulators, however, I would respect consistent regulatory rulings on preemption. *City of New York v. FCC*, 486 *U.S.* 57, 64, 108 *S. Ct.* 1637, 1642, 100 *L. Ed.* 2d 48, 57 (1988) ("[I]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care . . . , we should not disturb it

unless it appears . . . that the accommodation is not one that Congress would have sanctioned.' ") (quoting *U.S. v. Shimer*, 367 *U.S.* 374, 383, 81 *S. Ct.* 1554, 1560, 6 *L. Ed.* 2d 908, 915 (1961)).

Federal supremacy in the regulation of credit-card interest charges also makes sense. In many respects, credit cards have replaced the national currency. Residents of one state regularly make credit-card purchases from mail-order retailers in other states. Similarly, they use credit cards to charge meals, lodging, transportation, and other expenses when traveling throughout the nation and the world. Credit cardholders, moreover, can change their state of residence. Given the mobility of credit cardholders and transactions, federal regulation incorporating a bank's home-state's law is reasonable. The majority recognizes as much. It writes: "The theory of the NBA, as applied by federal and state courts, is that the borrower's state usury laws can be discarded because the customer either taking out a loan or using her 'lender credit card' partakes in a transaction in the national lender's home state." *Ante* at ___ (slip op. at 37).

-B-

Close analysis of New Jersey law, moreover, reveals that the RISA impermissibly interferes with the congressional goal of preventing states from discriminating against national banks. *Tiffany, supra*, 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64. Although the RISA prohibits certain lenders from imposing late fees on delinquent borrowers, various statutory provisions expressly authorize other lenders to charge such fees. For example, *N.J.S.A.*

17:13-104b expressly authorizes credit unions to charge late fees: "A credit union may charge late fees . . . not to exceed 20% of the principal balance and interest outstanding. . . . " Similarly, *N.J.S.A.* 17:16C-42(b), *L.* 1995, *c.* 43, § 1, as recently amended, provides that "[t]he holder of any retail charge account may collect a delinquency or collection charge in an amount not to exceed $10. . . . " Moreover, *N.J.S.A.* 17:9A-59.7 authorizes banks to charge late fees on advance loans. Thus, some New Jersey lenders are authorized expressly to charge late fees.

In 1981, the New Jersey Legislature enacted the State Bank Parity Act (the Parity Act), *N.J.S.A.* 17:13B-1 to -2, which is modelled after section 85. The Parity Act provides: "Notwithstanding any . . . statute to the contrary, any bank, savings bank, savings and loan association or credit union may charge a rate of interest . . . permitted to any other lender by the laws of this State. . . . " *N.J.S.A.* 17:13B-2.

If late fees are interest under the Parity Act, then any New Jersey bank may charge them. On that premise, the RISA would prohibit only national and out-of-state banks, such as Citibank, from charging late fees. That result would discriminate against out-of-state national banks that lend money to New Jersey borrowers. A state law that discriminates against out-of-state national banks conflicts directly with Congress's goals, and, therefore, is preempted.

The possibility of that conflict raises the question whether late fees are "interest" for purposes of the Parity Act. Title 17, which governs financial institutions, does not expressly define the term. The relevant New Jersey

statutes send inconsistent signals on the question whether the definition of interest excludes late fees. For example, *N.J.S.A.* 17:13-104(b), the same provision that authorizes credit unions to charge late fees, also authorizes credit unions to charge interest. Similarly, holders of retail charge accounts may charge interest under *N.J.S.A.* 17:16C-40 and late fees under *N.J.S.A.* 17:16C-42. Furthermore, *N.J.S.A.* 17:9A-59.6 discusses interest rates on advance loans, and *N.J.S.A.* 17:9A-59.7 authorizes late fees on those loans.

Although New Jersey statutes apparently distinguish annual interest and late fees, I cannot ignore the Legislature's unequivocal statement that it enacted the Parity Act as a corollary to section 85. The Assembly Banking and Insurance Committee Statement that accompanied the Parity Act declared that the Act

> would give state chartered banks, savings banks, savings and loan associations, and credit unions the same "most-favored-lender" authority that national banks presently enjoy. By the provision of 12 *U.S.C.* 85, national banks may take interest at the rate allowed by the laws of any state. . . . The [OCC], who supervises national banks, has interpreted this to mean that national banks may charge interest not only at the rate permitted by state law to banking institutions, but also at the rate for a similar type of loan made by any licensed lender. . . . This legislation, therefore, provides [similar] parity to state-chartered institutions.

In the Parity Act, the Legislature intended to grant state banking institutions the same benefits that national banks enjoy under the NBA, as construed by the OCC. Under

the Parity Act, therefore, state banks, like national banks, may charge late fees as interest.

The New Jersey Department of Banking has concluded that because late fees are interest under the NBA, they are interest for the purposes of the Parity Act. *See* Letter from Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994). Although informally expressed, the assistant commissioner's letter is the department's only expression of its understanding of the meaning of interest in the Parity Act. Both the state and federal legislative schemes rely on regulation by administrative agencies. Because the Legislature has entrusted the department with the regulation of state banks, the department's interpretations of state banking laws are entitled to judicial deference. *Lammers, supra,* 134 *N.J.* at 274.

Admittedly, the Legislature has not drawn distinct lines; it could have expressed its intent more definitively. We are remitted to finding the Legislature's intent in a statutory mosaic. The majority sees one picture. I see another.

I conclude that the definition of interest in the Parity Act includes late fees. Under the Parity Act, because credit unions and retailers may charge late fees, "any bank, savings bank, [or] savings and loan association" chartered in New Jersey also may charge such fees.

Because state-chartered banks may charge late fees to New Jersey customers, a state law, such as the RISA, that prohibits out-of-state national banks from charging such fees would constitute impermissible discrimination in

violation of the Supremacy Clause. In sum, I would hold that the NBA conflicts with, and thus preempts, the RISA.

-V-

Interestingly, the majority concludes that in the future out-of-state national banks may impose limited late-payment fees on New Jersey cardholders. The Court so concludes because the 1995 amendment to *N.J.S.A.* 17:16C-42,*L.* 1995, *c.* 43, § 1, extends the right to charge late fees of up to $10 to holders of retail charge accounts. For me, however, the source of a national bank's authority to impose late fees is not the RISA, but the NBA. By declaring that the RISA determines the amount of the late fee that a national bank may charge, the majority has inverted the Supremacy Clause so that state law trumps federal law. The need for uniform regulation of national banks, not misplaced notions of federalism, should prevail.

Ultimately dividing the majority and dissent are differing perceptions of the roles of Congress, federal banking regulators, and state courts in regulating national banks. The majority takes a position reminiscent of states'-rights advocates who opposed federal regulation of interstate commerce and of national banks. Banking, however, is integral to the national economy. Credit cards and other innovations such as electronic money transfers have converted consumer lending from a local to a national activity. In that context, the need for federal control is paramount. Until such time as Congress explicitly determines whether interest includes late charges, I would defer to the judgment of the OCC.

My colleague, Justice O'Hern, reaches the same result as do I, but through a different analysis. He proceeds from the major premise that the NBA expresses a general congressional intent, apart from the terms of the statute, that states must not favor state banks over national banks. *Post* at ___ (slip op. at 1). His minor premise is that New Jersey law permits lenders to impose late charges as interest. *Id.* at ___ (slip op. at 4). From this, he concludes that by permitting New Jersey banks, but not national banks, to impose such charges, New Jersey law violates the NBA.

My problem with his analysis is with its divination of congressional intent apart from the terms of the statute. For me, the reason that the NBA trumps RISA is that section 85 expressly permits national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located." "Interest," as previously explained, includes late charges. Close examination of the authorities cited by Justice O'Hern reveals that they rely not on metaphysical notions of congressional intent, but on the specific words of the statute. *Post* at ___ (slip op. at 3-4). I also find misplaced his concern that Congress did not intend states to "export" their "consumer protection attitudes" to other states. *Id.* at ___ (slip op. at 7).

The mischief hides in the term "export." When a South Dakota national bank charges interest, including late fees, as allowed by that state to a borrower in New Jersey, the charge is legal because the NBA expressly allows it, not because South Dakota is "exporting" its interest rate to New Jersey. The authority for the imposition of the charge is not South Dakota law, but the NBA.

Congress has defined the standard to measure the allowable rate of interest; that standard is interest as allowed by the national bank's home state. As Citibank's home state, South Dakota merely provides the point of reference. Only in a metaphorical sense is South Dakota "exporting" its rate of interest. In reality, a national bank may impose interest as allowed by its home state because Congress has so ordained.

For the preceding reasons, I respectfully dissent.

Justice Garibaldi joins in this dissent.

SUPREME COURT OF NEW JERSEY
A-102 September Term 1994

MARC SHERMAN, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Defendant-Respondent.

O'HERN, J., dissenting.

I agree with the majority that the National Bank Act does not preempt state consumer protection laws that prohibit late charges on credit card accounts. I would, however, allow national banks to assess late charges against credit card holders in New Jersey, not because the late charges are interest under the National Bank Act (they are not) and not because Congress has authorized the Comptroller of the Currency to preempt the State's consumer protection law, but because New Jersey law permits lenders to impose such late charges and may not discriminate against national banks that seek to impose the same charges.

In 1864 Congress enacted the National Bank Act, *c.* 106, 13 *Stat.* 99 (NBA). Section 85 of the NBA now provides that any national bank

> may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State * * *

> where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater * * * .
>
> [12 *U.S.C.A.* § 85.]

In addition to addressing interest rate differentials between state and national lending institutions, the NBA had a more profound purpose and effect – to assure that national banking institutions were never put at any economic disadvantage in competition with state-chartered institutions.[1]

Before the Civil War, Jacksonian distrust of concentrated power of mercantile interests had brought about the demise of national banks and the rise of the state banking systems. *Clarke v. Securities Indus. Ass'n*, 479 *U.S.* 388, 413, n.5, 107 *S. Ct.* 750, 764, n.5, 93 *L. Ed.* 2d 757, 777, n.5 (1987) (Stevens, J., concurring).

> Enactment of the National Bank Act was part of Congress's attempt to induce state-chartered banks to convert to national charters in order to achieve several federal objectives, such as the development of a national currency, the creation of a market for federal bonds to finance

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[1] Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980, *Pub. L.* No. 96221, 94 *Stat.* 132, authorize other federally insured depository institutions to collect interest as allowed by the laws of the state in which they are located. Those provisions generally confer on federally insured state banks the privileges that national banks enjoy under the NBA. For convenience of analysis, I refer only to the federally chartered institutions.

> the war, and the use of the national banks as depositories.
>
> [Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 *Geo. Wash. L. Rev.* 676, 699 (1983).]

If state-chartered banking institutions were permitted to make loans on more favorable terms than nationally chartered institutions, then nationally chartered institutions would be at an economic disadvantage. Congress "deliberately settled upon a policy intended to foster 'competitive equality' " between national banks and state banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 *U.S.* 122, 131, 90 *S. Ct.* 337, 342, 24 L. Ed. 2d 312, 318 (1969) (quoting *First Nat'l Bank of Loan, Utah v. Walker Bank & Trust Co.*, 385 *U.S.* 252, 261, 87 *S. Ct.* 492, 497, 17 *L. Ed.* 2d 343, 349 (1966)). In the *Walker Bank* case, involving branch banking issues, the Court wrote: "To us it appears beyond question that the Congress was continuing its *policy of equalization* first adopted in the National Bank Act of 1864." 385 *U.S.* at 261, 87 *S. Ct.* at 497, 17 *L. Ed.* 2d at 349 (emphasis added).

Because equalization, not preemption, is the congressional policy, New Jersey cannot grant late-charge privileges to its financial institutions and not to national banks:

> The purpose of section 85 is [1] to adopt the state law, relating to interest rates permitted, to permit national banks to charge the rate of interest allowed to competing lenders in the state, *and* [2] to guard against unfriendly federal-state legislation or ruinous competition with state

> chartered or licensed lenders. This interpretation of Section 85, commonly referred to as "the most favored lender policy" puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders. The statute prevents state legislation which purports to give state banks or possibly any state lender advantages over national banks.
>
> [*United Missouri Bank of Kansas City, N.A. v. Danforth*, 394 *F. Supp.* 774, 779 (W.D. Mo. 1975) (emphasis added).]

The New Jersey Department of Banking reasons that state-chartered credit unions "are authorized to offer credit cards and charge late charges without limit." (Letter from Francis P. Carr, Assistant Commissioner, New Jersey Department of Banking, to Dennis R. Casale 1 (Oct. 14, 1994) (citing *N.J.S.A.* 17:13-105(c)). Thus, even though late charges are not interest, a national bank must be permitted to impose late charges as long as a state lender may impose them. *See Saul v. Midlantic Nat'l Bank/South*, 240 *N.J. Super.* 62, 81 (App. Div.) (recognizing that under "most favored lender" doctrine, national banks may make loans on same terms as state-chartered credit union), *certif. denied*, 122 *N.J.* 319 (1990).

In addition, *S.* 1412, signed into law on March 7, 1995, amended the Retail Installment Sales Act (RISA), *N.J.S.A.* 17:16C-1 to -61, the statute on which plaintiffs have based their claims in this case. The 1995 amendment expressly authorizes the holder of any retail charge account to collect flat late charges. *N.J.S.A.* 17:16C-42. After that amendment there can be no question that a

nationally chartered credit card lender may not impose such late charges, at least to the extent allowed under *S.* 1412. Were it otherwise, Citibank explains, there would be favoritism shown to state lenders:

> The favored lender, by contracting for flat, contingent charges from late payers, can protect itself against risks and costs associated with delinquencies while keeping monthly percentage charges low to attract good customers who are consistently punctual. The disfavored lender, who cannot collect late charges, tends to get all the customers who anticipate paying late and tends to lose the customers with strong credit and habits of punctuality because it must impose higher monthly percentage charges to make up for its inability to impose late charges.

That competitive advantage cannot be given to the state-chartered institutions. *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 *F.*2d 855, 863 (6th Cir. 1972), held that because a Michigan-chartered savings and loan association was permitted to charge a borrower (in addition to interest) the closing costs of a real estate loan, a national bank could legally impose such additional charges. The *Northway Lanes* court quoted a principal drafter of the NBA, Senator John Sherman of Ohio, who explained that the purpose of the NBA was "to confer on these national banks the same privileges that are conferred by the laws of the States on other associations and individuals * * * [and] to place the national banks in each state on precisely the same footing with individuals and persons doing business in the state by its laws." 464 *F.*2d at 861 (quoting *Cong. Globe*, 38th Cong. 1st Sess. 2126 (1863)).

"National banks have been national favorites." *Tiffany v. National Bank of Missouri*, 85 *U.S.* (18 Wall.) 409, 413, 21 *L. Ed.* 862, 864 (1874). The NBA confers on them *"at least competitive equality"* with other lenders and a "possible advantage over state banks in the field of interest rates." *Fisher v. First Nat'l Bank of Omaha*, 548 *F.*2d 255, 259 (8th Cir. 1977) (emphasis added). No state may create a competitive disadvantage by favoring any class of state lenders over national lenders, as New Jersey would favor its state lenders if they alone can impose late charges. An Opinion Letter from the Office of the Comptroller of the Currency explains:

> [I]f a state allows state banks to charge credit card annual fees at flat rates, then section 85 allows national banks to do so as well. If national banks were not allowed to match state-regulated lenders on these flat loan charges, then the "most favored lender" principle would be destroyed.
>
> [Letter from Julie L. Williams, Chief Counsel, to John L. Douglas (Feb. 17, 1995), 1995 *WL* 71676 (OCC), *6.]

Plaintiffs seek to avoid the application of the "most favored lender" doctrine by arguing that The Credit Union Act, *N.J.S.A.* 17:13-73.1 to -125, did not always authorize unlimited late fees on retail charge cards, insisting that the more specific provisions of RISA controlled retail credit card transactions. Plaintiffs' interpretation of the law is of little consequence as long as the State regulators continue to permit state-chartered lenders to impose late charges. The NBA forbids precisely that form of discrimination against national banks.

States have a profound interest in their consumer protection laws. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 *U.S.* 299, 314, 99 *S. Ct.* 540, 548, 58 *L. Ed.* 2d 534, 545-46 (1978), held only that "interest rates of one State [can be] 'exported' into another" because a literal application of the plain language of "rate allowed" in Section 85 compelled that result. Only a distorted reading of Section 85 would allow exportation of the consumer protection attitudes of the home state of the national bank. See William G. Bornstein, Comment, *Extension of the Most Favored Lender Doctrine Under Federal Usury Law: A Contrary View*, 27 *Vill. L. Rev.* 1077, 1107-08 (1981-82) (analyzing the *Marquette* holding).

I cannot imagine that Congress intended that South Dakota or Delaware be permitted to export their concepts of consumer protection and to preempt and nullify the consumer protection laws of New Jersey. I therefore agree with that portion of the Court's opinion.

SUPREME COURT OF NEW JERSEY
A-103 September Term 1994

JAMES H. HUNTER, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,

Defendant-Respondent.

Argued February 15, 1995 – Decided November 28, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 272 *N.J. Super.* 526 (1994).

Michael D. Donovan, a member of the Pennsylvania bar, argued the cause for appellant (*Spector Gadon & Rosen*, attorneys; *Mr. Donovan and Ann Miller*, a member of the Pennsylvania bar, of counsel; *Mr. Donovan, Ms. Miller, Paul R. Rosen* and *Robert L. Grundlock, Jr.*, on the briefs).

Arthur R. Miller, a member of the Massachusetts bar, argued the cause for respondent (*Archer & Greiner*, attorneys; *Mr. Miller* and *Sean T. O'Meara*, on the briefs)

Marilyn A. Bair, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*James J. Ciancia*, Acting Attorney General, attorney; *Andrea M. Silkowitz*, Assistant Attorney General, of counsel).

Richard P. Jacobson submitted a brief on behalf of *amici curiae* The States of Arizona, Delaware,

Louisiana, Nevada, Ohio, South Dakota, and Utah (*Dunn, Pashman, Sponzilli, Swick & Finnerty,* attorneys).

Charles N. Riley submitted a brief on behalf of *amicus curiae* Consumer Action (*Tomar, Simonoff, Adourian & O'Brien,* attorneys).

Beverly R. Porway, Counsel, submitted a brief on behalf of *amicus curiae* Federal Deposit Insurance Corporation.

Charles N. Riley submitted a brief on behalf of *amici curiae* the States of Hawaii, Iowa, Maryland, Massachusetts, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin (*Tomar, Simonoff, Adourian & O'Brien,* attorneys).

Dennis R. Casale submitted a brief on behalf of *amici curiae* The New Jersey Bankers Association, American Bankers Association, American Financial Services Association and Consumer Bankers Association (*Jamieson, Moore, Peskin & Spicer,* attorneys).

Michael J. Dunne submitted a brief on behalf of *amici curiae* Visa U.S.A., Inc., and Mastercard International Incorporated (*Pitney, Hardin, Kipp & Szuch,* attorneys).

The opinion of the Court was delivered by HANDLER, J.

The facts and issues in this case are substantially similar to those in the companion case, *Sherman v. Citibank (South Dakota), N.A.*, ___ N.J. ___, *rev'g* 272 *N.J. Super.* 526 (1994), also decided today. Here, New Jersey credit-card holders challenge the legality of late-payment fees assessed by Greenwood Trust, a federally-insured state bank chartered in Delaware. The bank, on the other

hand, claims that it is permitted under the Depository Institutions Deregulation and Monetary Control Act to charge out-of-state customers the same interest rate and other lender-imposed charges it is authorized to charge its own customers.

The specific issues are framed by the contentions of the parties. Plaintiff is the named party in this class-action suit. As in *Sherman*, plaintiff argues that New Jersey's Retail Installment Sales Act, *N.J.S.A.* 17:16C-50, -54 (RISA) (since amended, *L.* 1995, *c.* 43) forbids federally-insured state banks that issue credit cards to New Jersey customers from charging late-payment fees, that defendant's advertising and cardmember agreements violate New Jersey's Consumer Fraud Act, *N.J.S.A.* 56:8-2, -19 (CFA), and that the imposition of late-payment fees constitutes a common-law breach of contract and conversion. Like the claims in *Sherman*, plaintiff's claims focus on whether the notion of interest includes late-payment charges.

Greenwood Trust, however, argues it is free to charge late-payment fees in New Jersey. It relies on section 521 of the Depository Institutions Deregulation and Monetary Control Act, 12 *U.S.C.A.* § 1831d (DIDA), which expressly mirrors section 85 of the National Bank Act, 12 *U.S.C.A.* § 85 (NBA), and provides that federally-insured state banks may charge borrowers "interest at a rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 1831d(a). Section 521 expressly preempts conflicting state "constitution[s] or statute[s]." *Ibid.* Because it is a federally-insured state bank chartered in Delaware, which includes late fees in its statutory definition of

interest, Greenwood Trust argues that RISA and plaintiff's other claims conflict with, and are preempted by, section 521. 272 *N.J. Super.* at 529-30.

The Law Division dismissed the complaint. The Appellate Division affirmed, 272 *N.J. Super.* 526, and we granted plaintiff's petition for certification. 138 *N.J.* 270 (1994).

For substantially the same reasons expressed in *Sherman*, we conclude that this State's usury law prohibiting banks from charging late fees does not conflict with the federal statute giving national banks and federally-insured state banks preferential treatment with respect to lending authority. We hold that DIDA does not preempt the New Jersey RISA's prohibition on late-payment fees, and, therefore, reverse the judgment of the Appellate Division.

I

Although it is clear that Congress intended section 521 to preempt conflicting state usury provisions, federal preemption of state law requires an actual conflict, not merely a potential, speculative or hypothetical one. *Rice v. Norman Williams Co.*, 458 *U.S.* 654, 659, 102 *S. Ct.* 3294, 3298-99, 73 *L. Ed.* 2d 1042, 1049 (1982); *Brown v. Hotel Employees International Union*, 468 *U.S.* 491, 510, 104 *S. Ct.* 3179, 3185, 82 *L. Ed.* 2d 373, 389 (1963). An actual conflict arises when it is impossible to comply with both state and federal law, or when state law is an obstacle to the accomplishment of the full purposes and objectives of Congress. *Schneidewind v. ANR Pipeline Co.*, 485 *U.S.* 293, 299-300, 108 *S. Ct.* 1145, 1150-51, 99 *L. Ed.* 2d 316, 325

(1988); *Feldman v. Lederle Lab.*, 117 *N.J.* 125, 135 (1991). However, courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible. *Exxon Corp. v. Hunt*, 97 *N.J.* 526, 533 (1984) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 *U.S.* 132, 83 *S. Ct.* 1210, 10 *L. Ed.* 2d 248 (1963); *Huron Cement Co. v. City of Detroit*, 362 *U.S.* 440, 80 *S. Ct.* 813, 4 *L. Ed.* 2d 852 (1960)). "Preemption of state law by federal statute is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained.' " *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 *U.S.* 311, 317, 101 *S. Ct.* 1124, 1130, 67 *L. Ed.* 2d 258, 264-65 (1981) (quoting *Florida Lime & Avocado Growers' Inc., supra*, 373 *U.S.* at 142, 83 *S. Ct.* at 1217, 10 *L. Ed.* 2d at 257).

Section 521 of DIDA provides that any federally-insured state bank may:

> notwithstanding any State constitution or statute to the contrary which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill or exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be the greater. . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The language and purpose of section 521 essentially imitate that of section 85 of the NBA. *See, e.g., Copeland v. MBNA America Bank, N.A., Colo.* (1995) (slip op. at 14). Courts and federal agencies have interpreted Section 521 as conferring on federally-insured state banks the same insulation from State usury laws that national banks have enjoyed for over 100 years under the NBA. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826-27 (1st Cir. 1992) (concluding that section 521 permits federally-insured state banks to "export" interest rates), *rev'g* 776 F. *Supp.* 21 (D. Mass. 1991); *Vanderweyst v. First State Bank*, 425 N.W.2d 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most-favored-lender" status), *cert. denied*, 408 U.S. 943, 109 S. Ct. 369, 102 L. Ed. 2d 359 (1988); *Smiley v. Citibank (South Dakota). N.A.*, 44 *Cal. Rptr.* 2d 441, 465, 66 (1995) (Arabian, J., dissenting); *id.* at 467-68 (George, J., dissenting). Thus, "interest," as that term is used in the NBA and DIDA, should be construed uniformly. *E.g., Greenwood Trust, supra*, 971 F.2d at 827 ("historical record clearly requires a court to read the parallel provisions of DIDA and the Bank Act in *pari materia*"); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157, 167 (1992) (finding that when legislature borrows exact phrase from existing statute, courts should adopt prior judicial interpretations of that phrase). As demonstrated in *Sherman*, the term "interest" in the NBA does not include late fees, ___ N.J. ___at (slip op. at 5-26); *Smiley, supra*, 44 *Cal. Rptr*, 2d at 469 (George, J., dissenting). We conclude that "interest" in DIDA similarly does not include late fees.

Like section 85, the language in section 521 expressly refers to interest rates. It says nothing about other specific charges associated with lending money. Thus, it would be improvident to impute to Congress the intent to include in the statute a meaning it did not express. Moreover, as we discussed at length in *Sherman*, the legislative history surrounding DIDA's enactment indicates that Congress intended to preempt only state usury laws regarding traditional interest, namely, periodic percentage rates, not other specific charges. *See Sherman*, ___ *N.J.* at ___ (slip op. at 10-14); *see also Smiley, supra*, 44 *Cal. Rptr.* 2d 441, 465 (Arabian, J., dissenting).

The record of Congressional debate and deliberation concerning the enactment of DIDA is generally supportive of the notion that preemption of credit-card regulation under DIDA is confined to numerical interest rates. *Ibid.* Even if the sponsors and supporters of DIDA preemption provisions were shown to be committed to achieving total competitive equality of all lending terms offered by state banks and national banks, the simultaneous and persistent concerns of the bill's sponsors to preserve state consumer protection must likewise be acknowledged. During Senate consideration of the conference report on March 27, 1980, Senator Proxmire emphasized the limited preemptive scope of Title V.[1] This

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[1] 126 Cong. Rec. S. 6900 (March 27, 1980):

> I wish to reemphasize the point made initially in the Senate Banking Committee report that in exempting mortgage loans from State usury limitations, we intend to exempt only those limitations that are included in the annual percentage rate. We do not intend to exempt limitations on prepayment charges,

limitation, in DIDA's Title V, to annual percentage rates is clear from the Senate floor discussions of mortgage loans, from the Senate Banking Committee Report, and from the hearings on DIDA in the House of Representatives.[2]

II

In this case, as in *Sherman*, the defendant relies on an agency interpretation of the statute to support its expanded notion of interest. However, to rely upon agency determinations in this case would be to undermine our responsibility to interpret the law by the views of an entity that has heretofore failed to provide a clear and consistent understanding of what Congress intended to include in its definition of interest. Far less than the usual amount of deference to an agency interpretation is

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attorneys' fees, late charges or similar limitations designed to protect borrowers.

[2] An official of the Federal National Mortgage Association, in response to an inquiry by Rep. St. Germaine, Chair of a House subcommittee considering DIDA, referred to the Senate Banking Committee Report cites above and stated:

> This expression of legislative intent not to displace state laws designed for consumer protection with regard to charges other than charges treated as interest would leave in place those protective enactments in the various states that relate to prepayment penalties, *late charges*, regulations on disclosure of interest charges and restrictions on other costs in connection with loan transactions *other than interest*.
>
> [*Regulation Q. and Related Measures: Hearings Before the Subcommittee on Financial Institutions of the Committee on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. 125-26 (1980) (emphasis added).]

appropriate when that agency has failed to adopt a consistent interpretation in administering the statute in question. *See Sherman, supra,* ___ *N.J.* ___ at (slip op. at 21-23) (citing *INS v. Cardoza-Fonseca,* 480 *U.S.* 421, 446 n.30, 107 *S. Ct.* 1207, 1221 n.30, 94 *L. Ed.* 2d 434, 457 n.30 (1987); *Watt v. Alaska,* 451 *U.S.* 259, 273, 101 *S. Ct.* 1673, 1681, 68 *L. Ed.* 2d 80 (1981); *General Elec. Co. v. Gilbert,* 429 *U.S.* 125, 143, 97 *S. Ct.* 401, 411-12, 50 *L. Ed.* 2d 343 (1976)); *see also Director, Office of Workers' Compensation Programs v. Mangivest,* 826 *F.*2d 1318, 1319-20 (3d Cir. 1987) (finding "ambiguities and inconsistencies in the Director's interpretation . . . of regulations . . . sufficiently great to preclude deference"); *Disabled in Action v. Sykes,* 833 *F.*2d 1113, 1117-19 (3d Cir. 1987), *cert. denied,* 485 *U.S.* 989, 108 *S. Ct.* 1293, 99 *L. Ed.* 2d 503 (1988); *Revak v. National Mines Corp.* 808 F.2d 996, 1002 (3d Cir. 1986) (rejecting deference arguments due to inconsistent agency interpretation of statute). Neither the Office of the Comptroller of the Currency (OCC), which regulates national banks, nor the Federal Depository Insurance Company (FDIC), the agency charged with the regulation of federally-insured banks, has issued consistent rulings concerning the interpretation of interest for purposes of the NBA and DIDA. *See Sherman, supra,* ___ *N.J.* at ___(slip. op. at 23-26). *But cf. Copeland, supra,* ___ *Colo.* at ___ (slip op. at 13) (asserting that "[t]he OCC *consistently* has taken the position that late payment fees are interest" under both section 85 of the NBA and section 521 of the DIDA) (emphasis added). Inconsistent agency rulings should not be guides for a judiciary, the government branch principally responsible for the construction of statutes. *See, e.g., SEC v. Sloan,* 436 *U.S.* 103, 118, 98 *S. Ct.* 1702, 1711, 56 *L. Ed.* 2d

148 (1978); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 *U.S.* 726, 745-46, 93 *S. Ct.* 1773, 1784-85, 36 *L. Ed.* 2d 620, 633-34 (1973).

III

In addition, New Jersey's State Bank Parity Act, *N.J.S.A.* 17:13B-1 to -2, does not authorize banks located in this State to charge late-payment fees in the guise of interest. *Sherman*, ___ *N.J.* at ___ (slip. op. at 28-31). Defendant contends, as did the defendant in *Sherman*, that because New Jersey credit unions are authorized to charge late fees to credit-card customers, *N.J.S.A.* 17:13-104b, New Jersey banks are so authorized pursuant to the State Bank Parity Act. That is simply not the case.

The State Bank Parity Act authorizes New Jersey banks to charge the same "rate of interest" charged by credit unions. *N.J.S.A.* 17:13B-2 provides, in pertinent part, that,

> any bank, savings bank, savings and loan association or credit union may charge a rate of interest on any class or type of loan at the rate of interest permitted to any other lender by the laws of this State on that class or type of loan.
>
> [*N.J.S.A.* 17:13B-2 (emphasis added).]

Although the Act provides for parity between the rates of interest charged by both banks and credit unions, the act does not explicitly authorize banks to charge other types of fees. Furthermore, there is no indication that the Legislature implicitly intended to authorize the imposition of such other fees in the State Bank Parity Act. *See Sherman, supra*, ___ *N.J.* at ___ (slip op. at 28-32). There are

sound reasons grounded in public policy why the Legislature would choose not to equate interest charges with other imposed fees like late charges. For example, because small, individualized lenders, such as credit unions, serve their own members and do not cater to a large market, they cannot spread costs like banks. Thus, they must be permitted to take certain actions to insure their solvency, such as charging late-payment fees. *Ibid.*

We hold that Greenwood Trust has failed to demonstrate a Congressional intention to preempt state usury laws that prohibit discrete, specialized charges that do not directly affect the interest rate. Thus, there is no conflict between New Jersey's RISA statute and DIDA. Prohibiting either national banks or federally-insured state banks from charging late fees does not constitute discrimination because, at the time defendant procured those charges, New Jersey banks were likewise prohibited from assessing them. Unless Congress itself expressly provides otherwise through legislation, we find that New Jersey's RISA statute prohibits Greenwood Trust from charging New Jersey customers late fees.

We note, however, as we did in *Sherman, supra,* ___ *N.J.* at ___ (slip op. at 39), that the late-charges at issue in this case were assessed prior to the enactment of *L.* 1995, *c.* 43, which amended the RISA to specifically allow for late-payment charges on retail charge accounts. The new statute, which took effect on May 29, 1995, applies prospectively only, and therefore is inapplicable to the late-payment charges at issue here. Nevertheless, we recognize that the newly amended RISA statute authorizes holders of retail charge accounts to charge late fees to customers. Thus, it would appear that *N.J.S.A.* 17:16C-42,

as amended, permits national banks and federally-insured state banks issuing credit cards to charge late-payment fees. *Sherman, supra,* ___ *N.J.* at ___ (slip op. at 39-42). The charges at issue in this case, however, are not permissible because they were assessed prior to May 29, 1995, the date the amendment became effective.

IV

The judgment of the Appellate Division is reversed.

Chief Justice Wilentz and Justices Stein, and Coleman join in Justices Handler's opinion. Justice Pollock has filed a separate dissenting opinion in which Justice Garibaldi joins. Justice O'Hern has also filed a separate dissenting opinion.

SUPREME COURT OF NEW JERSEY
A-103 September Term 1994

JAMES H. HUNTER, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,

Defendant-Respondent.

POLLOCK, J., dissenting.

This appeal focuses on the question whether late-payment fees are included in the definition of "interest" in the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 *U.S.C.A.* § 1831d ("DIDA"). A related issue is whether the DIDA preempts state laws prohibiting late fees. As in the companion case, *Sherman v. Citibank (South Dakota), N.A.*, ___ *N.J.* ___ (1995), also decided today, the Law Division dismissed the complaint. The Appellate Division affirmed, 272 *N.J. Super.* 526 (1994). The majority reverses. I dissent.

-I-

The facts in this case are substantially similar to those in *Sherman*. James H. Hunter is the plaintiff in a class action challenging the legality of late fees charged to New Jersey holders of credit cards issued by Greenwood Trust, a federally-insured Delaware bank. Hunter argues that New Jersey's Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-50, to -54 ("RISA"), forbids federally-insured state banks from charging late fees to New Jersey consumers.

He also argues that Greenwood Trust's cardmember agreement violates *N.J.S.A.* 56:8-2 and -19 (which prohibit consumer fraud), and that the imposition of late fees constitutes a common-law breach of contract and conversion. Like the claims in *Sherman,* Hunter's claims depend on whether interest includes late fees.

The DIDA, like the National Bank Act (NBA). which was the subject of *Sherman,* authorizes federally-insured state banks to charge borrowers "interest . . . allowed by the laws of the State . . . where the bank is located." Delaware's statutory definition of interest includes late fees: "If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge." *Del. Code Ann.* tit. 5, § 950 (1994). Thus, Greenwood Trust maintains both that the DIDA expressly authorizes charging late fees as interest and that the DIDA preempts conflicting state laws.

Hunter, however, contends that late fees are not interest under the DIDA. Specifically, he asserts that "interest" refers only to the periodic percentage rate charged on outstanding balances. He argues that his state-law claims do not conflict with the DIDA, and therefore that the DIDA does not preempt them. Alternatively, Hunter argues that the DIDA's express preemption clause preempts only his statutory, but not his common-law, claims.

-II-

This case requires us to determine the meaning of "interest . . . allowed by the laws of the State . . . where the bank is located," as that phrase is used in the DIDA.

Ultimately, matters of statutory construction involve a determination of congressional intent. *E.g., Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128, 111 *S. Ct.* 1156, 1163, 113 *L. Ed.* 2d 95, 106-07 (1991); *Roig v. Kelsey*, 135 *N.J.* 500, 515 (1994). In the DIDA, Congress did not expressly define "interest." Nor does a fair reading of the legislative history disclose the intended meaning of that term.

As discussed more fully in my dissent in *Sherman, supra*, ___ *N.J.* at ___ (slip op. at 6), the Civil War Congress enacted section 85 of the NBA to protect the newly-created national banking system from unfriendly state usury laws. Section 85 provides that any national bank

> may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at a rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater. . . .
>
> [12 *U.S.C.A.* § 85.]

In *Tiffany v. National Bank of Missouri*, 85 *U.S.* (18 Wall.) 409, 411-13, 21 *L. Ed.* 862, 863-64 (1873), the United States Supreme Court held, pursuant to section 85, that the defendant national bank could charge its borrowers the highest interest rate authorized to any lender in that state. The Court acknowledged that the "most favored lender" doctrine might disadvantage state-chartered banks, but relied on Congress's intent to create a strong

national banking system immune from hostile state legislation. *Id.* at 412-13, 21 *L. Ed.* at 863-64.

A century later, the Court determined that a national bank located in one state could charge its borrowers in other states the highest interest rate allowed to any lender in its home state. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978).

In the years following *Marquette*, interest rates soared. Although national banks could charge interest at a rate tied to the federal discount rate, local usury laws constrained state banks. *See Greenwood Trust Co. v. Massachusetts*, 971 *F.* 2d 818, 826 (1st Cir. 1992), *cert. denied*, ___ *U.S.* ___, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993). Congress rectified the imbalance by enacting the DIDA. *Ibid.*

Section 521 of the DIDA ("section 521") provides that

> [i]n order to prevent discrimination against any [federally-insured state bank], such State bank may . . . notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State

> . . . where the bank is located, whichever may be the greater. . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The text of section 521 virtually mirrors that of section 85. Section 521 articulates Congress's intent that the purpose of the DIDA, like that of the NBA, is to prevent discrimination against federally-insured state banks. Unsurprisingly, courts and banking regulators have interpreted section 521 as protecting federally-insured state banks from hostile state laws, just as section 85 protects national banks from those laws. *Greenwood Trust, supra,* 971 *F.* 2d at 826-27 (concluding that section 521 permits federally-insured state banks to "export" interest rates); *VanderWeyst v. First State Bank,* 425 *N.W.*2d 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most favored lender" status), *cert. denied,* 488 *U.S.* 943, 109 *S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988); Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 92-47, *Fed. Banking L. Rep.* (CCH) ¶ 81,534 at 55,730 (July 8, 1992) (most favored lender and exportation principle); Letter by Frank L. Skillern, Jr., General Counsel, FDIC No. 81-3 (February 8, 1981) (most favored lender status); Letter by Kathy A. Johnson, Attorney, FDIC No. 81-7 (March 17, 1981) (exportation principle).

I agree with the majority, *ante* at ___ (slip op. at 6), that "interest," as that term is used in the NBA and the DIDA, should be construed uniformly. *E.g., Greenwood Trust, supra,* 971 *F.* 2d at 827; *see also Morales v. Trans World Airlines, Inc.,* 504 *U.S.* 374, 383-84, 112 *S. Ct.* 2031, 2037, 119 *L. Ed.* 2d 157, 167 (1992) (finding that when legislature borrows exact phrase from existing statute, courts

should adopt prior judicial interpretations of that phrase). Substantially for the reasons set forth in my *Sherman* opinion, ___ *N.J.* ___, I conclude that "interest" in the DIDA includes late fees.

Interpretations of the Federal Depository Insurance Company (FDIC), the agency charged with the regulation of federally-insured banks, 12 *U.S.C.A.* § 1811, support that conclusion. In my dissent in *Sherman, supra,* ___ *N.J.* at ___ (slip op. at 1314), I noted that when Congress does not define a statutory term, courts should accept a reasonable interpretation of the term of the appropriate administrative agency. *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 *U.S.* ___, ___, 115 *S. Ct.* 810, 813, 130 *L. Ed.* 2d 740, 747 (1995); *Chevron, U.S.A., Inc. v. NRDC*, 467 *U.S.* 837, 843-44, 104 *S. Ct.* 2778, 2782-83, 81 *L. Ed.* 2d 694, 703-04 (1984); *Lammers v. Board of Educ.*, 134 *N.J.* 264, 274 (1993); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 327 (1984); Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, § 3.3 (3d ed. 1994) (discussing *Chevron*); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 516-18 (1989) (same). As described in my dissent in *Sherman, supra,* ___ *N.J.* at ___ (slip op. at 16-18), the Comptroller of the Currency, which regulates national banks, has long ruled that interest could include late fees. Like the Comptroller, the FDIC has concluded that interest, for purposes of section 521, includes late fees that are authorized by a bank's home state. Letter from Douglas H. Jones, Deputy General Counsel, FDIC No. 92-47, *Fed. Banking L. Rep.* (CCH) ¶ 81,534 at 55,730 (July 8, 1992). As in *Sherman*, I find that interpretation reasonable.

-III-

Whether a federal law, such as the DIDA, preempts a state law is a matter of congressional intent. *E.g., Cipollone v. Liggett Group, Inc.*, 505 *U.S.* 504, ___, 112 S. Ct. 2608, 2617-18, 120 *L. Ed.* 2d 407, 422-23 (1992). The inclusion of an express preemption clause unmistakably declares the intent of Congress to preempt conflicting state statutes. *Ibid.*

The DIDA, unlike the NBA, includes such an express preemption clause. Section 521 permits a national bank to charge interest at a rate allowed by its home state "notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section. . . ." The word "notwithstanding" suggests that Congress intended the DIDA to preempt conflicting state statutes. Thus, under the language of the DIDA's express preemption clause, the question is whether RISA's prohibition against late fees conflicts with section 521.

In *Sherman, supra,* ___ *N.J.* at ___ (slip op. at 28), I concluded that section 85 conflicts with state laws, such as RISA, that prohibit late fees. I likewise submit that section 521 conflicts with state laws prohibiting such fees. Under its express preemption clause, the DIDA perempts Hunter's statutory claims.

I further determined in *Sherman* that New Jersey's State Bank Parity Act authorizes banks located in this State to charge interest in the form of late-payment fees. ___ *N.J.* at ___ (slip op. at 27-28); *see* Letter by Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994). Because I conclude that New Jersey banks may charge late fees to their New Jersey customers, I also

conclude that a state law prohibiting out-of-state federally-insured state banks from charging such fees impermissibly discriminates against those institutions. *See Sherman, supra,* ___ *N.J.* at ___ (slip op. at 28). That conflict with the congressional intent to prevent discrimination against federally-insured state banks further supports my conclusion that the DIDA preempts state statutes that prohibit late fees.

-IV-

Hunter argues alternatively that even if the DIDA preempts his statutory claims, his common-law claims must survive. Specifically, he argues that the United States Supreme Court's holding in *Cipollone, supra,* 505 *U.S.* 504, 112 *S. Ct.* 2608, 120 *L. Ed.* 2d 407, limits the DIDA's preemptive scope to "State constitution[s] or statute[s]." 12 *U.S.C.A.* § 1831d(a). I disagree.

The Court recently addressed a comparable issue in *Freightliner Corp. v. Myrick,* 514 *U.S.* ___, 115 *S. Ct.* 1483, 131 *L. Ed.* 2d 385 (1995). In *Freightliner,* the Court clarified that *Cipollone* does not preclude implied preemption whenever Congress includes an express preemption clause in a federal statute. 514 *U.S.* at ___, 115 *S. Ct.* at 1487-88, 131 *L. Ed.* 2d at 393. "At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.* at ___, 115 *S. Ct.* at 1488, 131 *L. Ed.* 2d at 393. The Court emphasized that a statute's preemptive scope is a function of congressional intent. *Id.* at ___, 115 *S. Ct.* at 1487, 131 *L. Ed.* 2d at 393.

I believe that Congress intended that section 521 of the DIDA should have the same preemptive effect as section 85 of the NBA. A recent interpretive letter by the FDIC further supports that conclusion. Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 93-27, *Fed. Banking L. Rep.* (CCH) ¶ 81,635 at 55,838 (July 12, 1993) (concluding that Congress intended to confer upon federally-insured banks the same protections that section 85 of the NBA confers on national banks). I conclude that Hunter's common-law claims, like his statutory claims, conflict with the DIDA and are preempted.

-V-

In *Sherman, supra*, ___ *N.J.* at ___ (slip op. at 28-29), I disagreed with the majority's conclusion that in the future, out-of-state federally-insured state banks may charge late fees on delinquent customers, but only up to $10. Although I agree that those banks may charge such fees, I disagree that state law may limit the amount so charged. As a national banking law, the DIDA takes precedence over conflicting state law. Under the authority of the DIDA, Greenwood Trust may impose late fees as authorized by its home state, Delaware, without reference to another state's limitation on those fees. Consequently, the RISA's limitation on late charges must yield to the DIDA, as construed by the FDIC.

Accordingly, I respectfully dissent.

Justice Garibaldi joins in this dissent.

SUPREME COURT OF NEW JERSEY
A-103 September Term 1994

JAMES H. HUNTER, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

GREENWOOD TRUST COMPANY,

Defendant-Respondent.

O'HERN, J., dissenting.

I dissent for the reasons stated in my separate opinion in *Sherman v. Citibank*, ___ *N.J.* ___, also filed today.

No. 95-1056

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN K. COPELAND,

Petitioner,

—v.—

MBNA AMERICA, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

RESPONDENT'S MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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January 3, 1996

Question Presented

The sole question for review is the third question listed in the petition, which respondent believes should be restated as follows:

> Whether the term "interest" in Section 30 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees charged by a national bank on credit card accounts?

RULE 29.6 LISTING

Respondent MBNA America Bank, N.A., states that it is a wholly-owned subsidiary of MBNA Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1056

BRIAN K. COPELAND,

Petitioner,

v.

MBNA AMERICA N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

RESPONDENT'S MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent agrees with petitioner that this Court should grant a writ of certiorari to resolve a direct conflict between the decisions of the highest courts of three states on the issue of whether the term "interest" in Section 30 of the National Bank Act, 12 U.S.C. § 85 ("Section 85"), includes late payment fees. The Colorado Supreme Court in this case and the California Supreme Court in *Smiley* v. *Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 153, 900 P.2d 690, 700, 44 Cal. Rptr. 2d 441, 451 (1995), *petition for cert. pending*, No. 95-860 (U.S. filed Nov. 30, 1995), both held that Section 85 includes late payment fees as "interest." A recent decision of

the New Jersey Supreme Court in *Sherman* v. *Citibank (South Dakota), N.A.*, No. A-102-94 (N.J. Nov. 28, 1995), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995)(Pet. App. 51-124), held that it does not.

If late payment fees constitute "interest" for purposes of Section 85, they are not subject to state regulation, permitting national banks to conduct their interstate lending activities on a consistent basis throughout the nation.

A. Background

MBNA America Bank, N.A. ("MBNA"), is a national bank chartered by the Office of the Comptroller of the Currency ("OCC") and located in Delaware. MBNA issues Visa and MasterCard credit cards and extends credit to customers throughout the country. MBNA's cardmember agreements expressly state that MBNA may charge a late payment fee when cardholders fail to pay a specified amount of their outstanding balances by the payment due date.

On June 5, 1992, petitioner commenced an action, on behalf of himself and all Colorado holders of MBNA credit cards, in the Colorado District Court, County of Denver, alleging that he has a credit card issued by MBNA, that he had been assessed a late payment fee, and that such fees are impermissible under Colorado law. (Pet. App. 29-50.) On July 13, 1992, MBNA removed that action to the United States District Court for the District of Colorado, and on May 7, 1993, the district court granted petitioner's motion to remand on the ground that it lacked federal question or diversity jurisdiction over plaintiff's claims. *Copeland* v. *MBNA Am. N.A.*, 820 F. Supp. 537 (D. Colo. 1993).

B. How the Federal Question Was Presented and Resolved Below

Shortly after remand, MBNA moved for judgment on the pleadings on the ground that Section 85 preempts the state laws underlying plaintiff's claims. MBNA argued that Section 85 authorizes national banks to impose late payment fees as part of their loan charges when such fees are authorized by the laws of the bank's home state. Delaware law permits banks located there to charge late payment fees in connection with credit card lending. *See* Del. Code Ann. tit. 5, § 950. On July 9, 1993, the Colorado trial court granted MBNA's motion and dismissed the complaint in its entirety. (Pet. App. 27-28.)

On May 24, 1994, the Colorado Court of Appeals affirmed that dismissal. (Pet. App. 21-26.) The court of appeals specifically held that, since the term "interest" in Section 85 encompasses late charges, Section 85 preempts Colorado laws purporting to prohibit those charges. After the court of appeals denied his motion for reconsideration, petitioner sought and, on October 24, 1994, was granted review by the Colorado Supreme Court. (Pet. App. 18-20.)

The Colorado Supreme Court affirmed the court of appeals' decision, holding that "as a matter of federal law," MBNA's late payment charge "is a form of 'interest' under section 85 of the [National Bank Act]. Because MBNA is a national bank located in Delaware, and Delaware law permits the imposition of a late payment fee," MBNA may charge those fees to Colorado residents "despite the fact that Colorado prohibited such fees." (Pet. App. 6-7). The court entered its judgment on November 20, 1995.

ARGUMENT

I.

THE ISSUE OF WHETHER THE TERM "INTEREST" IN SECTION 85 INCLUDES CREDIT CARD LATE PAYMENT FEES WARRANTS REVIEW.

A. The Decision of the Colorado Supreme Court Conflicts with a Decision of the New Jersey Supreme Court.

The exercise of jurisdiction is warranted here because there is a conflict between the courts of last resort in Colorado and California and the court of last resort in New Jersey on the issue of whether the term "interest" in Section 85 covers credit card late payment fees. *See* Sup. Ct. Rule 10.

On November 28, 1995, the Supreme Court of New Jersey issued a decision in *Sherman* v. *Citibank (South Dakota), N.A.*, No. A-102-94 (N.J. Nov. 28, 1995), holding that "late-payment fees are not 'interest' within the intendment and purposes of [the National Bank Act]." (Pet. App. 54.) Not only does that holding directly conflict with the decision of the Colorado Supreme Court, but it also conflicts with a decision of the California Supreme Court in *Smiley* v. *Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 153, 900 P.2d 690, 700, 44 Cal. Rptr. 2d 441, 451 (1995) (holding that the term "interest" in Section 85 governs late payment fees), and of the Third Circuit in *Spellman* v. *Meridian Bank*, No. 94-3203, 1995 WL 764548, at *14-*18 (3d Cir. Dec. 29, 1995) (holding that late fees constitute "interest" under Section 85).

The New Jersey Supreme Court's decision also conflicts by inference with a decision of the First Circuit in *Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (holding that the term "interest" in a statute modeled after Section 85 includes credit card late payment fees), and with the long-standing interpretation of Section 85 by the Office of the Comptroller of the Currency ("OCC"), the federal banking agency charged with the responsibility for enforcing the National Bank Act and supervising the banking activities of national banks.[1]

A decision by this Court on the federal question presented here is also necessary to provide guidance to the multitude of lower courts in which the identical issue is pending. The issue of whether Section 85 governs credit card late payment and other credit card fees currently is presented for decision (or recently has been decided) in the courts of the States of California, Colorado, Pennsylvania, New Jersey and Wisconsin and in federal courts in Minnesota, Alabama and Pennsylvania.[2] In all of these actions, plaintiffs have argued

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[1] *See, e.g., Independent Bankers Ass'n of Am.* v. *Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *First Nat'l Bank* v. *Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980).

[2] The identical issue presented here is pending in the following cases: *Mazaika* v. *Bank One Columbus, N.A.*, 653 A.2d 640 (Pa. Super. 1994), *allocator granted*, 659 A.2d 557 (Pa. May 25, 1995); *Gadon* v. *Chase Manhattan Bank*, 653 A.2d 697 (Pa. Super. 1995) (appeal pending); *In re Citibank (South Dakota), N.A. Credit Card Litig.*, 653 A.2d 39 (Pa. Super. 1995), *allocator granted*, 659 A.2d 984 (Pa. May 31, 1995). In addition to the recent decisions in *Copeland*, *Smiley*, *Sherman* and *Spellman*, the issue also was presented in the following cases: *Richardson* v. *Citibank (South Dakota), N.A.*, No. 94SC670, 1995 WL 748059 (Colo. Dec. 18, 1995); *Stoorman* v. *Greenwood Trust Co.*, No. 94SC382, 1995 WL 748061 (Colo.

(continued...)

that Section 85 (or statutes modeled after Section 85) does not govern credit card late payment and other fees, that, in charging such fees, national banks have violated various provisions of state law, and that plaintiffs are entitled to millions of dollars in damages.

B. The Question Presented Is of Critical Importance to the Feasibility of Interstate Credit Card Programs.

The National Bank Act was enacted by the Civil War Congress in 1864 for the purposes of establishing a strong national banking system and fostering interstate lending. *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978). Section 85 authorizes a national bank to charge interest at the rate allowed by the law of the state where the bank is located. To effectuate Congress's objective in enacting the National Bank Act, courts over the years have interpreted Section 85 broadly to govern a wide array of loan-related charges. *See, e.g., Citizens' Nat'l Bank* v. *Donnell*, 195 U.S. 369, 373-74 (1904); *Northway Lanes* v. *Hackley*

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[2](...continued)
Dec. 18, 1995); *Harris* v. *Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (U.S. filed Dec. 18, 1995); *Hunter* v. *Greenwood Trust Co.*, No. A-103-94, 1995 WL 710417 (N.J. Nov. 28, 1995), *petition for cert. pending*, No. 95-963 (U.S. filed Dec. 18, 1995); *Tikkanen* v. *Citibank (South Dakota), N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Wisconsin* v. *Ameritech Corp.*, No. 92 CV 1013 (Wis. Cir. Ct. July 14, 1993); *Syx* v. *Greenwood Trust Co.*, CV 91-8824 MC (Ala. Cir. Ct. 10th Cir. May 2, 1994). *See also Hill* v. *Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992); *Nelson* v. *Citibank (South Dakota) N.A.*, 794 F. Supp. 312 (D. Minn. 1992).

Union Nat'l Bank & Trust Co., 464 F.2d 855, 861-64 (6th Cir. 1972).

Similarly, the OCC over several decades has interpreted Section 85 to include a diverse group of charges, including credit card late fees. *See, e.g.*, Office of the Comptroller of Currency, Interpretive Letter No. 670, Julie L. Williams, Chief Counsel, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. ¶ 83,618, at 71,832, 1995 WL 416305 (Feb. 17, 1995). On March 3, 1995, the OCC proposed a formal rule confirming its long-standing view that Section 85 includes a variety of loan-related charges assessed in connection with lending or the extension of credit. *See* 60 Fed. Reg. 11924-11941 (1995) (to be codified at 12 C.F.R. § 7.4001). The OCC also participated as *amicus curiae* in the Colorado Supreme Court, urging that court to interpret the term "interest" in Section 85 broadly to include credit card late fees.[3]

National banks have relied on that regime of judicial and regulatory authority in establishing their lending programs, including their credit card lending programs. According to recent industry data, banks have lent billions of dollars in connection with their interstate credit card programs. Faulker & Gray, Inc. Credit Card News, *Why Card Issuers' Average Balances Were Flat at Year-End 1994* (Oct. 15, 1995). These interstate lending programs require uniformity and predictability of governing law. The conflict between the recent decisions of the California, Colorado and New Jersey

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[3] This Court has held that the OCC's reasonable construction of the National Bank Act should be accorded deference. *See, e.g., NationsBank of N.C., N.A.* v. *Variable Annuity Sec. Indus. Ass'n*, 115 S. Ct. 810 (1995); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987).

Supreme Courts undermines the uniformity and predictability necessary to the continued vitality of these programs.[4]

Not only do the banks need to know what law they must look to in establishing their programs, but consumers, regulators and state legislatures need to know the laws governing these matters. For instance, while this case was pending in the Colorado courts, the Colorado legislature passed a law permitting banks located in Colorado to charge late payment fees, on the legislature's understanding that under Section 85 and other related federal banking statutes Colorado banks could charge those fees to all customers regardless of where they reside. *See* Colo. Laws 1993, S.B. 93-170, § 2 (eff. Apr. 26, 1993) (codified at Colo. Rev. Stat. § 5-3-203(6)). Also relying on extant regulatory and judicial interpretations of Section 85 and related federal banking statutes, other state legislatures have recently amended their laws. *See, e.g.*, Cal. Fin. Code §§ 4000-4001 (Deering Supp. 1995); N.J.S.A. 17:16C-42(a). Thus, resolution of the issue presented here will provide all affected parties with guidance as to the applicable regulatory regime.

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[4] Twenty-six states have laws that prohibit or restrict late charges. DRI/McGraw Hill, *A Study of Employment, Regulations and the Credit Card Industry*, at Table 3, pp. 16-17 (Feb. 1993). If, as the New Jersey Supreme Court held, all non-periodic percentage credit card fees charged by national banks are governed by the law of the borrower's state, rather than by Section 85 of the National Bank Act, banks would be deprived of uniformity and predictability with regard to credit card accounts in any of those twenty-six states.

II.

THE OTHER TWO QUESTIONS PRESENTED IN THE PETITION DO NOT WARRANT REVIEW.

Petitioner raises two questions in the Petition which do not merit review by this Court. The questions of whether Congress intended "Delaware's legislative definition of 'interest' to define the federal term 'interest'" in Section 85 (question 1 in the petition) and whether Congress may "constitutionally delegate to Delaware the power to define the federal lending term 'interest'" (question 2 in the petition) are not certworthy issues because the Colorado Supreme Court did not hold that Congress intended Delaware to define the term "interest" or that Congress has the constitutional authority to do so. To the contrary, the Colorado Supreme Court held only that "interest" "as a matter of federal law" includes late payment fees. (Pet. App. 6.)

The court, in clear terms, framed the question that it was deciding, to wit: "if late payment fees are a form of 'interest' under section 85 of the [National Bank Act]." (*Id.* at 8.) In resolving that question it looked first to the statute, concluding that Section 85 "does not provide a definition for the term 'interest' or 'interest at the rate'" (*id.* at 9), and then to the legislative history of the statute, concluding that it "does not directly address whether late payment fees are a form of 'interest'" (*id.* at 11). After a review of decisions of this Court and lower federal and state courts, the court stated that "it is apparent that a national bank can charge a variety of banking fees, as forms of 'interest,' to credit cardholders in other states if allowed by the national bank's home state." (*Id.* at 12.) In addition to finding "sufficient [judicial] authority to allow [it] to conclude that a form of late payment fees was included in the definition of the term 'interest' at the time the

[National Bank Act] was enacted," the court accorded deference to "OCC administrative opinions and rulings" interpreting Section 85 to govern late payment fees. (*Id.* at 13.) It then concluded "that the NBA's purpose and legislative history compel a finding that late payment fees are a form of 'interest' under section 85 of the National Bank Act." (*Id.* at 17.) The court's analysis and conclusion demonstrate conclusively that it decided only the issue of whether "interest" in Section 85 includes late payment fees.

The statement in footnote 4 of the decision does not, contrary to petitioner's contention, demonstrate that the court decided that Congress intended for Delaware's legislative definition of "interest rate" to displace Colorado's statutory and common law prohibiting late fees on revolving credit accounts. Indeed, to the extent the court even considered the issue of whether federal or Delaware law displaces Colorado law, its decision was that Congress did not so intend:

> The NBA directs that a nationally chartered bank may charge interest on loans as permitted by the bank's home state. The incorporation here of Delaware law has an incidental effect on enforcement of a provision of the Colorado UCCC when a Colorado resident . . . chooses to obtain a loan from MBNA. That fact, however, does not amount to a showing of preemptive effect. Congress has limited its regulation in the NBA to nationally chartered banks and has made no attempt either to interfere with Colorado's regulation of state chartered banks or to occupy the field of consumer loans.

(*Id.* at 6 n.4.) The language of the court on the issue of whether "interest" is defined by reference to federal law or Delaware law could not be clearer: "We conclude that, as a matter of federal law," MBNA's late charge "is a form of

'interest' under Section 85 of the [National Bank Act]." (*Id.* at 6.)

Nor is there any merit to petitioner's contention that certiorari should be granted on the issue of Congress's constitutional authority to delegate to Delaware the power to define the term "interest" in Section 85 since the court did not decide that Congress has such constitutional authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted as to question 3 of the petition as restated by respondent in this memorandum.

Respectfully submitted,

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